United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1494

To be argued by
JED S. RAKOFF

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1494

B/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

ANTHONY M. NATELLI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JED S. RAKOFF,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

Anthony M. Natelli appeals from the denial, on October 20, 1976 by the Honorable Richard Owen, United States District Judge, of his motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or, in the alternative, for relief pursuant to 28 U.S.C. § 2255. Natelli claims here, as he did below, (i) that at his trial the Government failed to offer sufficient evidence of an essential element of the offense for which he was convicted, and (ii) that the Government, in opening and summation, argued to the jury a version of the facts allegedly proven erroneous in separate, subsequent litigation. Both of these errors, too, are claimed to have been the result of a "deliberate" Government "tactic" to hide the truth from the jury.

In January, 1974, Natelli, formerly a partner in the accounting firm of Peat, Marwick, Mitchell & Co. (here-

inafter "Peat"), was, together with Joseph Scansaroli (a more junior accountant working under Natelli), indicted in Count 2 of Indictment 74 Cr. 43 which charged them with making and causing to be made false and misleading financial statements in a proxy statement of National Student Marketing Corporation (hereinafter "NSMC"), in violation of Section 32 of the Securities Exchange Act of 1934 (15 U.S.C. § 78ff) and the aiding and abetting statute (18 U.S.C. § 2). The five other defendants named in the indictment, all officers of NSMC, ultimately pled guilty.

Following a four-week trial before the Honorable Harold R. Tyler, Jr., then United States District Judge, and a jury, Natelli and Scansaroli were found guilty on November 14, 1974. Natelli immediately filed his first new trial motion under Rule 33, alleging, virtually *in haec verba*, the first of the two claims he makes here. Following the denial of this motion and the imposition of sentence, Natelli and Scansaroli appealed. Once again Natelli raised, as his first point on appeal, the first claim he makes here, and, in addition, the gist of the second claim he makes here. On appeal, this Court (*per* Gurfein, *C.J.*), in a written opinion reported at 527 F.2d 311 (2d Cir. 1975), found these claims "without merit" and Natelli's other claims likewise unpersuasive, and affirmed his conviction, while reversing for a new trial the conviction of his co-defendant Scansaroli.

Natelli then petitioned this Court for rehearing, with suggestion for rehearing *in banc*, raising the two claims he raises here, and, in a letter to the original panel, directing the Court's attention to the same testimony in the separate, subsequent litigation (the "*Mulien* trials") that he here contends supports his second claim. Even though, while Natelli's petition was pending, the Court

twice reheard the case as to his co-defendant Scansaroli,* Natelli's petition for rehearing was denied.

Natelli then filed a petition for writ of certiorari, raising both the first of his claims here and also, at some length, the precise second claim he raises here. The Supreme Court denied his petition without comment, 425 U.S. 934 (1976).

Having thus exhausted his direct remedies, Natelli began raising the same claims collaterally. Because of Judge Tyler's resignation, this, Natelli's second new trial motion (raising the same claims previously denied by Judge Tyler), was assigned to Judge Owen. On October 20, 1976, in a succinct five page opinion, Judge Owen denied both of Natelli's claims,** holding as to the first claim,

> "This point has been argued and rejected as without merit by the trial court, the jury and the Court of Appeals. From a review of the evidence in this area, the argument has not gained merit in the ensuing months." ***

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* Specifically, on the Government's petition for rehearing, the panel reinstated Scansaroli's conviction, but then, on Scansaroli's subsequent petition, the panel reinstated its reversal for a new trial. Ultimately, an agreement was reached between the Government and Scansaroli whereby the Government agreed not to retry him upon his consenting to a life-time bar from practicing securities accounting, pursuant to Rule 2(e) of the rules of practice of the Securities and Exchange Commission (hereinafter the "S.E.C.") Formal orders to this effect were filed in January, 1977.

** Judge Owen also denied Natelli's motion to reduce his sentence of 60 days imprisonment, to be followed by 10 months probation, and a $10,000 fine. Following this denial, Natelli served his prison term and is presently serving his probationary term.

*** Memorandum and Order of October 20, 1976, p. 5, reprinted at p. 230 in the Joint Appendix to this appeal, hereinafter "Jt. App." In addition to the Joint Appendix, the appendices forming

[Footnote continued on following page]

and as to the other,

> "Defendant builds a house of cards which, under sharp scrutiny, falls." (Jt. App. at 228).

It is from Judge Owen's denial of his claims that Natelli brings his instant appeal.

Statement of Facts

This Court, in an opinion by Judge Gurfein, has already stated the facts of this case once—and, one would have thought, once would have been enough. But not, it seems, for Natelli, who, in his instant brief, chooses to ignore this Court's prior statement of facts and to disregard the settled rule that on appeal the evidence should be viewed in the light most favorable to the Government * with full weight accorded to "the right of the jury to determine issues of credibility, weigh the evidence, and draw reasonable inferences of fact,** including any adverse inferences drawn from a rejection of Natelli's own lengthy testimony at trial.*** Natelli instead presents

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part of the record on this appeal includes the five volumes of the Appendix from Natelli's direct appeal of his conviction, hereinafter referred to as "Appeal App.," and the attachments to appellant's instant brief, which he also labels "Appendix," hereafter referred to as "App. to Br.". "Br." refers to Appellant's present Brief.

* *E.g., Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Kahaner*, 317 F.2d 459, 467 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963).

** *United States* v. *Greenberg*, 534 F.2d 523, 524 (2d Cir. 1976) (per curiam), *citing United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974).

*** *United States* v. *Tramunti*, 500 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *Cf. United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

this Court with his own lengthy re-statement of the case (Br. at 3-21), based largely on inferences unsuccessfully argued to the jury and prior courts, quotations taken out of context from later, largely irrelevant litigations, and assertions having no support anywhere in the record of this or, to the Government's knowledge, any other litigation. Consequently, it is incumbent at the outset to restore this appeal to its true factual context by summarizing Natelli's overall fraud, as the jury found it and as Judge Gurfein stated it for this Court.*

National Student Marketing Corporation, as its name indicates, marketed to students the goods and services of other companies (its "clients"), particularly through its on-campus student representatives ("campus reps"). (GX 5). NSMC was not formed until 1966 and first went public in April, 1968. In just the first ten months of 1969, NSMC was able to acquire, largely in exchange for its stock, more than a dozen solid and substantial companies worth hundreds of millions of dollars. (GX 25). This huge growth was attributable in very large part to NSMC's first predicting, and then reporting as

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* The following account is drawn primarily from Judge Gurfein's statement of the case at 527 F.2d 315-18 and his statement of the sufficiency of the evidence as to Natelli at 527 F.2d 318-21. It also draws on other portions of Judge Gurfein's opinion and, where noted by transcript or exhibit references, to trial testimony or exhibits of particular pertinence to this appeal. For a fuller listing of the underlying transcript and exhibit references supporting Judge Gurfein's statement of facts and the present summary, the Court is respectfully referred to the Statement of Facts and the argument as to sufficiency set forth at pp. 2-42 of the Government's brief on the direct appeal, which is also part of the record on this appeal. In addition, further transcript and exhibit references pertinent to this appeal are set out in the Argument section of this brief, *infra*, with "GX" designating Government Exhibits, "NX" designating Natelli's Exhibits, and "Tr." designating the trial transcript. Most (though not all) of the trial exhibits and transcript references cited herein can also be found reprinted in the Appendix from the direct appeal.

accomplished facts, large and very rapidly growing internal earnings, with reported profits doubling and even tripling. (GX 5, 25, 40, 46, 5[illegible]; Tr. 197-99, 1037ff., 1950-54). And, what most lent credibility to these reports of earnings was that many of them bore, to various degrees, the imprimatur of the internationally-known firm of Peat, Marwick, Mitchell & Co., which became NSMC's outside auditors in August 1968. (GX 5, 25; Tr. 1037ff., 1078).

But the truth was not what it appeared. NSMC was actually losing money throughout this period. (GX 65-2, 65-14, 26, 33). It was able to report profits only by perpetrating a sophisticated fraudulent scheme, the essence of which was an accounting fraud: NSMC reported as earnings what were no better than hopes; it used the reports of earnings to acquire genuine companies in exchange for its inflated stock; and then it hid the fact that the earlier-reported earnings never materialized by retroactively substituting for them the genuine earnings of the after-acquired companies. Essential to the scheme was the wilful connivance of the Peat partner in charge of the NSMC account, Anthony Natelli.* (Tr. 137-45).

Specifically, in the months preceding Peat's first audit of NSMC, NSMC's president, Cortes W. Randell,** was

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* While Natelli no longer challenges the jury's finding that his preparation of false financial statements on behalf of NSMC was done knowingly and wilfully, he seeks to soft-peddle this fact by stating it to be a finding of his "failure to investigate." (Br. at 23-24). On the contrary, the jury, as developed *infra*, was required to, and did, find that Natelli caused the making of these false statements knowingly, deliberately, and with criminal intent.

** Randell, together with NSMC's chief financial officer Bernard J. Kurek, its chief legal officer John G. Davies, and its two chief salesmen Dennis M. Kelly and Robert Bushnell, all ultimately pled guilty to one or more felony counts of fraud and conspiracy.

widely predicting that NSMC's profits for its fiscal year ending August 31, 1968 would show a doubling of earnings from the year prior; and with these claims, NSMC's stock skyrocketed from $6/share to $80/share within six months of the initial offering. When the audit began, however, the Peat team working beneath Natelli reported back that NSMC had actually suffered a loss for the year. (GX 4C, 5; Tr. 181-89, 714-15; see also GX 1; Tr. 148).

The First Retroactive Booking of Unbilled Accounts Receivable.

Thereupon, Randell suddenly uncovered what he claimed were $1.7 million in firm "commitments" from NSMC's "clients." (Tr. 151ff.; GX 2). Although these alleged commitments were commitments to pay NSMC in the *future* for services that NSMC was to render in the *future*—services, moreover, of a scale far greater than anything NSMC had performed, or demonstrated any capacity to perform, in the past—Randell asked Natelli to permit NSMC, which had never entered these commitments on its books previously, to book them, retroactively, as "sales" and "earnings" for the fiscal year that was by this point (late September to early October, 1968) more than two months past. (Tr. 151ff.). For this extraordinary proposition, Randell offered the theory—never seriously checked by Natelli, and, as shown below, contradicted by the evidence at trial—that NSMC's "real" work was the time (rarely more than 100 hours) spent by NSMC's salesmen in designing a marketing proposal for the client and selling it to the client, as opposed to implementing it—even though the implementation was what the client was obligating itself to pay for. (Tr. 151ff., 1829; GX 2).

Natelli agreed to almost all of what Randell requested, and he justified this in accounting terms by

reference to what he called "percentage of completion" accounting. (GX 3, 4C; Tr. 712-17). Under this approach, suggested by Natelli,* the "commitments" were viewed as "contracts in progress," and the amount of "progress" or "completion" was measured by the number of *hours* spent by each NSMC *salesman* in putting together his *proposal* for the client and *selling* it to the client as a percentage of the total time the same salesman *estimated he* would spend on the project. (GX 3, 4C, 5). Natelli then permitted NSMC to book, as actual earnings for the fiscal period now two months past, this *estimated* "percentage-of-completion" times the total *estimated* profits from these "commitments" (known also as "fixed fee contracts" and, slightly more candidly, as "*unbilled* accounts receivable") which were to be performed and paid for in the future and for which NSMC had not recorded any expenses on its part. (GX 3, 4B, 4C, 5; Tr. 721-24, 1974). Straining credulity still further, Natelli, at Randell's request, permitted his chief subordinate, Scansaroli, to "confirm" these "commitments" by means of telephone calls dialed by NSMC's salesmen to what were alleged to be representatives of the clients, but which later turned out to be, for example, NSMC's own printer. (GX 2; Tr. 192-93, 1601-08, 1838-39). As summarized by Judge Gurfein:

> "On the basis of the above, Natelli decided not only to recognize income on a percentage-of-completion basis, but to permit adjustment to be made on the books after the close of the fiscal year in the amount of $1.7 million for such 'unbilled accounts receivable.' This adjustment turned

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* As detailed below, Natelli's claim that the "percentage of completion" approach as it was applied to NSMC's accounting did not originate with him is contrary to the clear weight of the evidence.

the loss for the year into a handsome profit of $388,021, showing an apparent doubling of the profit of the prior year." 527 F.2d at 316.

These figures, fully certified by Natelli and seemingly confirming Randell's predictions, appeared in NSMC's annual report for 1968, without any disclosure of the fact that such a huge and material adjustment had occurred after the close of the fiscal year. (GX 5). In addition, shortly after the issuance of this report, as noted by Judge Gurfein, "seven companies were acquired, largely in exchange for [NSMC] stock, in reliance on the 1968 annual report." 527 F.2d at 316; see also Tr. 197-99.

The Concealed Write-Off of the Year-End Reported Profits.

Simultaneously with the acquisition of these new companies, NSMC began writing off as worthless the still-future, still unbilled, still-unperformed "commitments" which Natelli had certified just a few months earlier. (Tr. 206ff., GX 7). By the Spring of 1969, over $1 million of the $1.7 million of these "commitments" had been written off. (GX 65-5). These write-offs, though fully known to Natelli, were not revealed to any of the companies who were merging with NSMC in reliance on its 1968 reported figures. (*E.g.*, Tr. 1015, 1022ff., 1057ff.). And the improper accounting tricks by which Natelli and NSMC concealed these write-offs in all later reports of figures for both NSMC's "sales" and NSMC's "earnings" were a sure sign of the accounting nature of the fraud.

First, $350,000 of the written-off "commitments", though previously booked as "sales" of *1968*, were now subtracted from NSMC's *1969* sales figures, where they could be offset by the genuine sales figures of the new companies recently acquired by NSMC, with which they were

"pooled." * (GX 11, 13). However, to have done this with all the write-offs would have depressed 1969 sales figures beyond repair; accordingly, the remaining $678,000 of write-offs was subtracted from 1968 figures. (GX 11, 13). Here, however, a break-down in terms of pre-acquisition NSMC and the after-acquired companies was required, since they had been separate companies in 1968. So, in entries that were designed and approved by Natelli and Scansaroli at NSMC's special request, the $678,000 in sales reduction was fraudulently subtracted, not from NSMC's own 1968 sales figures, but from the 1968 sales figures of those later-acquired companies that were not even part of NSMC in 1968! The result of this, of course, was that the high sales figures reported for NSMC for 1968 falsely remained intact. (GX 11, 13, 25; Tr. 633-70, 879-93).

As for the nearly $210,000 write-down in 1968 earnings attributable to the same write-off of sales, Natelli and his team provided similarly fraudulent accounting solutions: $21,000 of the reduction in 1968 earnings was, in the same manner as the sales figures, simply and fraudulently subtracted from the 1968 earnings figures for the later-acquired companies. As to the remaining loss of $188,750, they (i) took a wholly-unrelated tax credit of roughly the same amount that had been conveniently discovered about the same time—and that, as Natelli later admitted, was itself an error; (ii) treated it as the equivalent of an ordinary increase in earnings, though it was nothing of the kind; (iii) "rounded it off" to an unround number precisely the

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* Specifically, 1969 figures for NSMC and the companies it had acquired in 1969 were lumped together without break-down. Gross figures were similarly "pooled" for 1968 as well, but then broken-down in a footnote.

same, to the penny, as the remaining $188,750 reduction in earnings attributable to the write-offs; and (iv) without disclosure, improperly "netted" it with that reduction of earnings attributable to the write-offs—thereby leaving NSMC's 1968 earnings figures, like its 1968 sales figures, exactly the same as originally reported.* (GX 11, 13, 25, 65-12; Tr. 645-54, 1373-76). As Judge Gurfein said:

> "The effect of the netting procedure was to bury the retroactive adjustment which should have shown a material decrease in earnings for the fiscal year ended August 31, 1968." 527 F.2d at 317.

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* It was virtually uncontradicted at trial that both the improper subtraction of one company's sales from the figures for another company's sales and the improper netting of an extraordinary tax credit with an ordinary earnings loss were clear violations of generally accepted accounting principles. (*E.g.*, Tr. 567, 692-93, 1307, 1315). But even without the benefit of the arcane learning of accounting principles, any jury could see that these accounting shenanigans were blatantly fraudulent. By the same token, Natelli's contention (Br. at 7 n.5) that there was no expert testimony that percentage of completion accounting in the abstract (as opposed to how it was applied to NSMC) was improper, is very largely irrelevant. With all deference to Natelli's amici (here Peat, and, on the direct appeal, also the American Institute of Certified Public Accountants), it is now clearly established (assuming it was ever in doubt) that the fact that financial statements may or may not have been prepared in accordance with generally accepted accounting principles is not some kind of magic talisman which determines whether or not the accountants preparing the statement have committed fraud. See *United States* v. *Simon*, 425 F.2d 796, 805-08 (2d Cir. 1969) (Friendly, *C.J.*), *cert. denied*, 387 U.S. 1006 (1970).

The Second Retroactive Booking of Unbilled Accounts Receivable (The Pontiac "Commitment").

These adjustments, originally promulgated by Natelli and Scansaroli in the Spring of 1969 (and later embodied in the proxy), concealed NSMC's 1968 losses. (GX 65-12). But at the same time, NSMC, which was preparing an interim report for the first six-months of 1969—*i.e.*, for the period ended February 28, 1969—to be shown to new potential acquisitionees, was confronted with the problem that its own current internal losses had now grown so huge that, even when "pooled" with the earnings for the companies just acquired, initial figures for the six-month period showed a loss. (Tr. 222-23, 736-41; GX 10A, 40, 65-15). So, once more Randell, two months after the close of the period, suddenly came up with a previously unbooked "commitment"—this one a whopping $1.2 million purported "commitment" from Pontiac. (GX 13). This "commitment," documented solely by an ambiguous letter (GX 12) itself dated April 28, 1969—well after the close of the six-month period—was said to relate back to a "commitment" that had been given prior to February 28, 1969. (GX 13). Accordingly, even though Natelli's system of booking such unbilled commitments for future services had now been shown to be inappropriate by the results of its use in 1968, the bulk of the Pontiac "commitment" was promptly, and retroactively, booked, providing NSMC with still another instant profit to feature to both shareholders and potential acquisitionees. (*Id.*).

While Natelli had no direct responsibility for NSMC's six-month report, he was fully aware of this second post-period transformation of a loss into a profit and of the fact that the circumstances of this transformation went wholly undisclosed. (*e.g.*, Tr. 222-23). Also, as indicated, he and Scansaroli had been directly responsible for the

entries concealing the subsequent write-off of more than $1 million in "commitments" originally booked as part of the first post-period transformation. (Tr. 563-67, 633-44, 663-64, 890-93, 1197-1211, 2062-68). As the Spring continued, Peat's accountants learned of still more previously-booked "commitments" that had now proven worthless. (GX 13, 15; Tr. 238-39, 736-41).

Tremors began to be felt within Natelli's team, and, as he confided in June to Kurek (NSMC's chief financial officer, who was part of the scheme), the accountants working under him feared that their careers were at stake and that they might lose their licenses. (Tr. 233-38, 1933ff., 2032-38; GX 14). Natelli himself had similar fears, complaining that "when we got to the end of a [fiscal period], a contract or two are slipped in at the last minute." (GX 16; Tr. 246). He told Randell he could not leave the Pontiac "commitment" on the books if it was not at least backed-up by a letter in the "commitment" form that he and NSMC's inside counsel had previously worked out. (GX 16; NX-G; Tr. 238-46, 574, 673).

But, despite these fears, the fraudulent scheme seemed on the verge of final success; for Randell had already begun negotiating for the acquisition of six more companies, one of which, Interstate National Corporation ("Interstate"), was an established Chicago-based insurance company with assets and earnings of such size and firmness that they would not only offset any subsequent NSMC write-offs, but would also assure NSMC a solid financial base for the foreseeable future. (GX 25). After viewing NSMC's 1968 annual report and 1969 six-month interim figures and hearing from Randell about the Pontiac "sale," Interstate's board of directors, on August 12, 1969, tentatively approved the merger, contingent on getting NSMC's latest financial figures—for the nine-months ended May 31, 1969—and having these figures pass Peat's review. (Tr. 1033ff.).

The Concealed Write-Off of the Six-Month Reported Profits, and the Third Retroactive Booking of Unbilled Accounts Receivable (the Pontiac-Eastern Switch).

On the evening of August 14, 1969, with the Interstate officials waiting in Chicago for word, Randell and Natelli went to the Pandick Press offices in New York, where employees from NSMC and Peat were getting the final figures ready for printing in the proxy statement that was required for the proposed merger. (Tr. 251ff., 651-2, 1038ff.). Around midnight, the Interstate people were read over the phone profitable NSMC figures for the nine-month period, of which the chief item of profit was the Pontiac "commitment." (Tr. 253-54, 1038ff.). But about 1 a.m., Natelli, whose word was final on these matters, once again balked at including the Pontiac "commitment" with no billings and with no more back-up than the original, ambiguous letter. (Tr. 255-58).

Discussion ensued. Then, about 3 to 4 a.m., Randell announced "Well, I have an Eastern Airlines commitment. Can we include that in the May 31 statements?" (Tr. 258-59). This was the third time this trick had been pulled, and in his own notes made later that day, Natelli himself described it as "weird." (Tr. 257-63, 651-55, 2056-57; GX 21). As both NSMC's chief financial officer (Kurek) and NSMC's comptroller (Buck), who had primary responsibility for the proxy figures, testified, they had never before heard of there being any such Eastern commitment; and even in his own discredited testimony at trial, the best Natelli could muster was that he had heard of it "right prior" to the Pandick Press meeting. (Tr. 259, 263, 654-55, 1914).

Randell then placed a 4 a.m. call to Dennis Kelly—the same salesman responsible for the Pontiac "commitment"—and, later that day, Kelly arrived with a letter

on Eastern letterhead, signed by Thomas E. Mullen, "Manager—Special Markets," and purporting, in language closer to the "form" but still far from unambiguous, to commit Eastern to "utilize" $820,000 of NSMC's services in 1970. (Tr. 259-63; GX 18). Moreover, although the letter was dated August 14, 1969 (*i.e.*, the day before Kelly brought it down), it purported to "confirm" an earlier "verbal commitment" given May 14, 1969, thus conveniently bringing it within the period ending May 31 covered by the proxy figures (GX 18, 25). Randell, in a clear display of his criminal intent, went so far as to suggest not only that this Eastern "contract" be substituted for the Pontiac commitment but also that this be done without *any* alteration at all in the profitable figures previously read to the Interstate people, even though the Eastern "sale" was somewhat smaller. (Tr. 1920).

Yet, despite this not-very-veiled acknowledgement by Randell of his criminal purpose and despite the fact that this "commitment" had never before appeared anywhere on NSMC's books and that, as Judge Gurfein noted, NSMC had "no record of expenditures on the Eastern 'commitment,' no record of having ever billed Eastern for services on this 'sale,' and not one scrap of paper from Eastern other than the suddenly-produced letter" (527 F.2d at 320; see Tr. 572, 1149-50)—despite all this, Natelli agreed to let NSMC book the bulk of this Eastern "commitment" as "sales" and "earnings" for the period ending May 31, 1969. (GX 25). Thus, in the familiar pattern, Randell's predictions of "profit" had once again become a self-fulfilling prophecy. "Profits" were "confirmed" to the public, in the face of internal figures, by an undisclosed last-minute, post-period, retroactive booking of a huge new unbilled "commitment" for future services.

Virtually at the same time, moreover, a junior Peat accountant named Oberlander discovered that an additional $320,000 in previously-booked "commitments" were

worthless and suggested to Scansaroli they be written off. (Tr. 1222-28; GX 65-15). Scansaroli, however, consulted with Natelli, and they decided against it. (Tr. 263-72, 747-764, 2093-97). As in prior periods, had NSMC not booked any "unbilled accounts receivables" in its nine months earnings figures, they would have shown an appreciable loss. (Tr. 222-23, 1221; GX 10A, 65-2, 65-14).

The False and Misleading Proxy Statement

The final proxy, then, as delivered in September to Interstate and other acquisitionees, contained two false and misleading financial statements (the two "specifications" of Count Two). The first was the audited financial statement for 1968, recertified by Natelli as part of the proxy. The figures in this first statement, particularly as set out in a footnote which purported to separate the figures for NSMC as it was in 1968 from those of the later-acquired companies, were both false and misleading. They were false in that they reproduced the aforementioned fraudulent entries which, by improper subtractions and improper netting, made it appear that nothing had happened to NSMC's originally reported 1968 sales and earnings whereas in fact over $1 million of them had now proven illusory. (GX 65-11). The statement for 1968 was also materially misleading in that neither in it, nor anywhere else in the proxy, was there disclosed the simple, straightforward, and highly material facts that NSMC had actually lost money in 1968, rather than making money as it appeared, and that huge commitments it had claimed were firm had proven worthless. (GX 65-2, 65-5; Jt. App. 180-81). Indeed, the one tiny hint of a narrative disclosure of what was going on was crossed out of the draft by Natelli personally. (GX 17, 65-9, 65-10; Tr. 563-67, 1197-1211).

Likewise, the nine-month earnings statement—over which, in the form of a "review," Natelli had in fact exercised final authority (determining, as noted, what

items were taken out and what items were substituted in their stead)—was false and misleading. It reported as "sales" and "earnings" for the period ended May 31 both the contracts which Oberlander had reported worthless and the last-minute, suddenly-appearing, unbilled, unperformed, unsubstantiated Eastern commitment for future services and future payment—a patent sham. (GX 3, 13, 15, 65-14, 65-15). Moreover, the nine-month earnings statement was further false and misleading in that neither in it nor anywhere else in the proxy was there disclosed: (a) that the reported profitable picture for the nine-month period rested largely on a post-period substitution of a previously unbooked contract for a similarly large previously booked one that had been written off as unbookable; (b) that this was the third such huge, retroactive, post-period adjustment; (c) that over $2 million in unbilled "commitments" that had formed the basis of the previous two such adjustments had been secretly written off the books after the profits had been reported; (d) that all these unbilled future commitments were being booked under an accounting method that had by now repeatedly shown itself to be wholly unreliable and inaccurate in fairly presenting NSMC's actual financial position; (e) that NSMC, separate and apart from its after-acquired companies, had at all relevant times lost money in ever-increasing amounts; and (f) that, even after including the profits from the after-acquired companies, NSMC was able to show a profit only by booking these doubtful unbilled accounts receivable under this dubious accounting method approved by Natelli. (*Id.*; see also Jt. App. 182, c. 3). As Judge Gurfein concluded: "A *true* disclosure, *which was not made*, would have shown that without these unbilled receivables, [NSMC] had no profit in the first nine months of 1969." 527 F.2d at 318 (emphasis supplied).

ARGUMENT

POINT I

The Government Introduced Ample Evidence of The False And Misleading Character of The Second Statement Charged Against Natelli; And Natelli, Having Fully Litigated The Sufficiency of This Evidence at Every Stage of His Direct Appeal, May Not Now Re-Litigate It by Way of Collateral Attack.

The first of Natelli's two points on this appeal is the claim that, even though the Government proved that Natelli *knew* the falsity of the two false and misleading statements he was accused of making in NSMC's proxy statement,* the Government failed to prove the under-

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* While expressly disclaiming any challenge here to the sufficiency of the proof that Natelli had acted knowingly in making the false statements charged to him (Br. at 23), Natelli repeatedly insinuates that the jury did not find that he "actually" knew his false and misleading statements were false and misleading but only that he made them in "reckless disregard" of whether they were false and misleading in circumstances where he had a duty to "investigate." (*E.g.*, Br. at 2, 5, 24, 29, 30, 40). This is nothing but sleight-of-hand, substituting for what the jury was required to find what they were told was some of the circumstantial evidence they could consider in drawing inferences. Specifically, the jury was instructed that, as an essential element of the crime, they must find that Natelli made his false and misleading statements (and, indeed, committed the entire crime) both *knowingly* and *wilfully* (Tr. 2361), and, in this regard, that they must find, among other things, that Natelli actually *knew* that the statements were false or misleading (Tr. 2363) and that he nonetheless made them with "an *intention* to include false and misleading information." (Tr. 2364). In determining these requirements of knowledge and wilfulness, the jury was instructed that it could draw inferences from circumstantial evidence (Tr. 2364), including such evidence as whether

[Footnote continued on following page]

lying objective false and misleading character of the second of the two statements, and, more especially, failed to prove the falsity of the Eastern "commitment," which Natelli deems the essence of the second statement.

On the contrary, the Government at the trial of this case introduced ample (albeit circumstantial) proof of the underlying false and misleading character of the second statement, so much so that each of the five or more times Natelli has previously litigated its sufficiency the Court deciding the matter has had no difficulty in dismissing Natelli's claim as being wholly without merit. Moreover, since the trial court (former Judge Tyler), this Court, and the Supreme Court have all previously rejected this claim, the instant new trial motion, which seeks to place this ordinary question of evidentiary sufficiency in issue once again, is surely barred, as Judge Owen found, by well-settled principles of finality.*

Natelli *deliberately* turned away from the obvious (Tr. 2364) and whether he recklessly stated as facts "matters of which he *knew* he was ignorant." (Tr. 2365). From such circumstantial facts, as well as numerous other possible circumstances mentioned by the Court (such as deviation from generally accepted accounting principles), the jury could, if it chose, draw an inference of whatever weight it cared to as to what was really going on in Natelli's mind and what his true intentions were (Tr. 2365). But the jury still had to reach, from all the evidence, a conclusion beyond a reasonable doubt that Natelli, actually knew his false or misleading statements were false or misleading, and that he actually intended that these false or misleading statements be such. (*Id.*)

* Specifically, Judge Owen's written opinion (which Natelli is careful never to quote even once in the entirety of his 50-page appeal from it) disposed of this issue as follows:

> "This point has been argued and rejected as without merit by the trial court, the jury and the Court of Appeals. From a review of the evidence in this area, the argument has not gained merit in the ensuing months." (Jt. App. at 230).

[Footnote continued on following page]

A. The Precise Point Has Been Fully and Repeatedly Litigated by Natelli and Determined Adversely to Him by Courts of Every Level, So That He is Not Entitled to Re-Litigate It Here.

Natelli's precise claim is that "Appellant's conviction must be set aside because the government failed to introduce any evidence of the falsity of the Eastern Airlines contract, an essential part of the offense charged under the specification involving the unaudited nine-month earnings statement [*i.e.*, the second false and misleading statement specified in the charge]." (Br. at 22). This claim is closely linked to Natelli's other point on this appeal, where he claims that the Government's alleged failure to show the falsity of the Eastern Airlines contract was a "deliberate" ploy—a "false scenario crafted by the government" (Br. at 39)—designed to mislead the jury by keeping from them evidence helpful to Natelli. (*E.g.*, Br. at 29-30, 34, 39). These claims and accusations have previously been raised by Natelli at every possible level of this extended litigation.

Thus, at the close of the Government's evidence in the trial of this case, Natelli's counsel moved for acquittal on the ground, among others, that

> "I don't think there is any proof here that the Eastern contract, for example, was not what it

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Natelli purports to find support for his position even in this abrupt rejection, in that he contends that "despite the fact that the government argued that appellant's claim was foreclosed by prior adjudication, the district court apparently concluded that the issue remained open since it reached the merits" (Br. at 31). A far fairer reading is that the District Court adopted both of the Government's contentions: that the issue had been previously determined with finality (sentence 1) and that, *alternatively*, the underlying claim was meritless (sentence 2).

> purported to be. There's been no proof offered by the Government that that was anything other than a commitment signed by an authorized representative of Eastern Airlines." (Tr. 1320).

After this claim was denied, Natelli's counsel put the issue to the jury on summation, arguing as to both the Pontiac "commitment" letter and the Eastern "commitment" letter that "There's no evidence there was anything wrong with either of these. . . ." (Tr. 2202; Jt. App. 91). The jury, however—properly instructed that, in order to convict, they must find that the specified statements were objectively false or misleading, and materially so at that, (Tr. 2361 ff.)—rejected Natelli's argument and found him guilty.

Shortly after the verdict, Natelli's counsel filed written motions seeking a directed verdict of acquittal or a new trial, on the ground, among others, that "there is no proof in the record that this [Eastern] commitment was in fact fraudulent." (Memorandum in Support of Defendant Natelli's Motion for a Judgment of Acquittal or, In the Alternative, For a New Trial, at 6).* Judge Tyler promptly rejected this claim.

Next came the direct appeal from Natelli's conviction, in which Natelli raised as the very first point of his original brief this same claim ("Point I: The evidence was not sufficient to establish . . . that the proxy statement was materially false in the respects alleged"). Indeed, in his present papers, after devoting some 30 pages to restating and rearguing his version of the proof

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* Likewise, at oral argument on this same motion Natelli's counsel claimed that there had been a "glaring omission in the Government's proof," to wit, "what is lacking here is actual proof by the Government that the [Eastern] contract was indeed false." (Appeal [illegible] p. at A-249-50). Thus, the new trial motion from which Natelli takes this present appeal is actually the second new trial motion to raise this precise claim.

concerning Eastern, Natelli finally lets slip the fact that he has already presented all this to this Court before:

> "We acknowledge that the government's failure to prove the falsity of the Eastern contract was raised on direct appeal." (Br. at 30).

But, he argues nonetheless that, since, in his view, the decision of the Court of Appeals simply dismissed the point--along with several other frivolous points made by Natelli--as being "without merit" (527 F.2d at 327), therefore, he say, "The absence of any explicit analysis of this issue on direct review undercuts the force of the government's reliance on prior adjudication." (Br. at 31). In order words, any time this Court simply dismisses a fully and expressly litigated claim of evidentiary insufficiency as being without merit, but fails to engage in any more "explicit analysis," the issue remains undecided and is open to relitigation *de novo* at the losing party's whim.*

The clear implication of Natelli's argument is that the panel of this Court hearing Natelli's direct appeal—despite its detailed opinion and its own statement that it had given his appeal "searching consideration" (527 F.2d at 318)—in reality did not do its job and, instead, ignored or insufficiently focused on Natelli's claim that the Government failed to prove the actual falsity of the Eastern

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* One wonders just how much "explicit analysis" is required under "Natelli's Rule" before a determination by this Court can be said to be final. As discussed immediately below, this Court did in fact make an express finding that the nine-month earning statement was in fact false. Also, in a recent decision, this Court, assessing the sufficiency of the evidence, noted that, because of the voluminous record, "we can no more than briefly indicate the nature of the evidence. . ." *United States* v. *Hanlon*, Dkt. No. 76-1340, slip op. 1445, 1448 (2d Cir., Jan. 7, 1977). Does that mean that, under Natelli's Rule, the defendants in *Hanlon* would be free to relitigate sufficiency *de novo?*

contract. This claim cannot withstand scrutiny. For, while, to be sure, Natelli, his co-defendant Scansaroli, and their various *amici*, inundated the Court of Appeals with hundreds of pages of briefs and dozens of claims, the particular claim in question was repeatedly spotlighted for the Court. For example, not only did it constitute part of Natelli's very first point in his original brief, but he also made it one of the focal points of his reply brief, *e.g.*: "we *again stress* that the Government never proved the primary fact—that the Eastern contract was, in fact, 'phony.'" (Natelli's Reply Brief on Direct Appeal at 19) (emphasis supplied).

The fact is that any fair reading of Judge Gurfein's four-page statement of the facts that "[t]he jury could permissibly have found" (527 F.2d at 315-18), let alone the rest of the opinion, shows that this Court did scrutinize the objective truth or falsity of both specifications, and expressly held as to the second specification (*i.e.*, the nine-month earnings statement) that: "A true disclosure, *which was not made*, would have shown that . . . NSMC had no profit in the first nine months of 1969." (*Id.* at 318) (emphasis supplied).

Moreover, after the panel's original decision affirming Natelli's conviction, Natelli filed a petition for rehearing and suggestion for rehearing in banc, in which the claim in question was the primary focus:

> "[T]he panel accepts as proven the Government's assertion that the Eastern commitment was not genuine, despite the fact that the Government totally failed to prove that the letter signed by Mullen was not the legally binding commitment it purported to be. Thus, the panel has upheld a conviction for 'knowingly' making a 'false' statement, although there is no proof in the record that the statement at issue was, in fact, false.

> The Government deliberately failed to prove this essential element because to do so it would have had to prove that Mullen, the Manager of Special Markets of Eastern, had conspired with the president of National Student Marketing to deceive the auditors and had actually furnished a written confirmation of this commitment during the subsequent audit." (Appellant Natelli's Petition For Rehearing and Suggestion for Rehearing In Banc, at 2-3).*

Since, after this petition was filed, the highly conscientious original panel reheard the case as to the other

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* As is evidenced by the latter part of this quotation, not only the first of Natelli's present claims (that the Government failed to prove the falsity of the Eastern contract) but also the essence of his second present claim (that this was part of the deliberate Government tactic to mislead the jury by presenting an "erroneous" version of the facts) was presented to the Court of Appeals on Natelli's direct appeal. Indeed, while Natelli's petition for rehearing was still pending, the *Mullen* trials occurred, and Natelli, purporting to find in Randell's testimony there the same "confirmation" for his position as he does here, promptly addressed a letter to the original panel of the Court of Appeals that began:

> "In our pending petition for rehearing we ask the Court to consider the point that the Government failed to prove that the Eastern letter was not a genuine commitment. We asserted that the Government counsel deliberately failed to prove this essential element of its charge because a full presentation of the facts surrounding the recording of the Eastern commitment would tend to exculpate the accountants." (Natelli's Letter of Oct. 28, 1975, at 1).

The letter went on to quote over five pages of the Randell testimony quoted in Natelli's present brief, and concluded that, if the Government had undertaken to properly prove the falsity of the Eastern contract by calling Randell, "the prosecutor would not have been able to make the distorted assertions in his summation which are set forth above." (*Id.* at 6).

defendant, Scansaroli, not once but twice, there was every opportunity for the panel to order rehearing as to Natelli too if it had found anything of merit in these claims. Plainly, it found none.

Natelli's next step was to petition the Supreme Court for *certiorari*, trumpeting the very same arguments.* The Supreme Court promptly denied certiorari.

Having exhausted his remedies but not, apparently, his litigious zeal,* Natelli then filed with Judge Owen the instant motion raising the identical claims about the alleged failure of the Government to prove the falsity of the Eastern contract. Submitting to the District Court the full trial transcript, his 35-page "Statement" from his brief on direct appeal, and two lengthy new briefs as well, Natelli asked Judge Owen to wade through all this material and second-guess the trial judge, former Judge Tyler, on a pure question of evidentiary sufficiency that had already been litigated at all levels. The Government responded by asserting that the issue was no longer litigatable, but, that, assuming *arguendo* it was, the actual evidence, as particularized in our brief on direct appeal (which we also submitted), showed the

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* *E.g.*: "Significantly, the government never offered any evidence that the Eastern letter examined by petitioner was anything other than what it purported to be—a binding commitment by Eastern to purchase at least $820,000 of NSMC's services—and, indeed, testimony by the principal government witness in a subsequent, related prosecution showed that the prosecutor had substantially (and apparently knowingly) misrepresented the facts in his presentations to the jury trying petitioner." (Natelli's Petition for Certiorari, at 19). In a footnote to this sentence of his certiorari petition, Natelli added: ". . . What is important here is that the government failed to show that the Eastern contract was a fraud—an essential element to sustain this specification."

* Nor that of his employer, Peat, which would have to bear the financial brunt in civil litigation of the lawsuits resulting from Natelli's crimes.

issue to be meritless. As noted (p. 19, *supra*), the District Court adopted both these contentions of the Government and denied Natelli's claim as meritless. Natelli then filed the present appeal.

In short, the issue forming the entirety of Natelli's first and principal point on this appeal (not to mention the essence of his second and only other point) has already been litigated to its fullest, in terms indistinguishable from those he now employs—and determined with finality against him. By raising it yet again, Natelli exhibits, at best, a disregard for the principles of finality and for the strain that constant re-litigation of the same issue places upon the Court's limited time and resources, and, at worst, a cynical design to judge-shop in the hope of finding some arbiter somewhere who can be persuaded to disagree with all the prior tribunals.

The law does not permit such a manuever. It is firmly established that a collateral challenge under 28 U.S.C. § 2255 may not be used to relitigate matters already litigated on appeal.* Indeed, the basic rule is even stronger. As stated by Judge Weinfeld in *Williams* v. *United States*, 334 F. Supp. 669 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972):

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* Below, Natelli styled his motion as one for "a new trial based on newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or in the alternative, granting him relief pursuant to 28 U.S.C. § 2255 or 28 U.S.C. § 1651(a)" (Natelli's Notice of Motion, at 1). Here, in what is apparently a tacit concession that, as Judge Owen found, there was no new evidence and that, consequently, a motion under Rule 33 (which on any other ground except newly discovered evidence must be brought within 7 days of verdict) is unavailable, Natelli refers to his motion as being solely one under § 2255.

> "It is hornbook law by now that a section 2255 motion may not be used to relitigate matters not only decided, but which could have been presented, on direct appeal [citing cases], nor may the section be applied in a collateral attack based upon a fragmentized claim which petitioner raised in a slightly different fashion at his trial and upon appeal [citing cases]." (334 F. Supp. at 671).*

As summarized by Professor Bator in "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441, 451-52 (1963), the reasons for this rule include, among others, that:

> "[I]n the first place, [it assures] conservation of resources—and I mean not only simple economic resources, but all of the intellectual, moral, and political resources involved in the legal system. The presumption must be, it seems to me, that if a job can be well done once, it should not be done twice. . . . The challenge really runs the

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* *Accord, Meyers* v. *United States*, 446 F.2d 37, 38 (2d Cir. 1971); *United States* v. *Granello*, 403 F.2d 337, 338 (2d Cir. 1968), *cert. denied*, 393 U.S. 1095 (1969); *Castellana* v. *United States*, 378 F.2d 231, 233 (2d Cir. 1967); *Argo* v. *United States*, 473 F.2d 1315 (9th Cir.), *cert. denied*, 412 U.S. 906 (1973); *Hardy* v. *United States*, 381 F.2d 941 (D.C. Cir. 1967); *Franano* v. *United States*, 303 F.2d 470, 472 (8th Cir. 1962) (per curiam); *Smith* v. *United States*, 265 F.2d 14, 16 (5th Cir. 1959). Cf. *Sanders* v. *United States*, 373 U.S. 1 (1963), where the Supreme Court, while noting that principles of *res judicata* must be applied with liberality in the case of § 2255 petitions where "the habeas applicant [is] typically unlearned in the law and unable to procure legal assistance" (rather strikingly unlike appellant here), nonetheless held that, even then, "nothing in § 2255 requires that a sentencing court grant a hearing on a successive motion alleging a ground for relief already fully considered on a prior motion and decided against the prisoner." 373 U.S. at 9, 11.

other way: if a proceeding is held to determine the facts and law in a case, and the processes used in that proceeding are fitted to the task in a manner not inferior to those which would be used in a second proceeding, so that one cannot demonstrate that relitigation would not merely consist of repetition and second-guessing, why should not the first proceeding 'count'? Why should we duplicate effort? After all it is the very purpose of the first go-around to decide the case. . . .

Mere iteration of process can do other kinds of damage. I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all shots will always be called by someone else. Of course this does not mean that we should not have appeals. As we shall see, important functional and ethical purposes are served by allowing recourse to an appellate court in a unitary system, and to a federal supreme court in a federal system. The acute question is the effect it will have on a trial judge if we then allow still further recourse where these purposes may no longer be relevant. What seems so objectionable is second-guessing merely for the sake of second-guessing. . . .

Another point, too, should be remembered. The procedural arrangements we create for the adjudication of criminal guilt have an important bearing on the effectiveness of the substantive commands of the criminal law. I suggest that finality may be a crucial element of this effective-

> ness. . . . A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands. Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders. . . . The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility.
>
> One further point should be made in this canvass of the general policies which support doctrines of finality in the criminal law. . . . Repose is a psychological necessity in a secure and active society, and it should be one of the aims . . . of a procedural system to devise doctrines which, in the end, do give us repose, do embody the judgment that we have tried hard enough and thus may take it that justice has been done. There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern. . . ."

Although these policies were expressed in terms of state prisoners seeking *habeas corpus* relief, they apply *a fortiori* in the case of a federal prisoner seeking relief under § 2255 with respect to a question of evidentiary sufficiency that he has already fully litigated at each level of the federal process.

To be sure, an occasional case has authorized relief under § 2255 where, unlike here, there was a significant

change in the relevant law between the time of appeal and the time of the filing of the § 2255 motion. See, *e.g.*, *Davis* v. *United States*, 417 U.S. 333, 342 (1974). But we are aware of no case—and Natelli has cited none—where, in the absence of an intervening change of law, a Court has authorized relief under § 2255 on an issue that was fully litigated at every level of the direct appeal. When there is added to this the fact that the issue which Natelli seeks to relitigate here is one merely of evidentiary sufficiency (to wit, whether there was adequate proof of the actual false or misleading nature of one of the two false or misleading statements he was convicted of making), his claim that he is entitled to relitigate the issue once more in the guise of a § 2255 motion is far-fetched.* As for the cases he cites in alleged support of

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* Indeed, apart from any Court-made rules of finality (discretionary or absolute as the case may be), there is a serious question of subject-matter jurisdiction under § 2255, since the issue of evidentiary sufficiency in this case raises neither jurisdictional nor constitutional issues nor specifically involves the "laws of the United States." See *Sunal* v. *Large*, 332 U.S. 174, 179 (1947) ("It is plain . . . that the writ is not designed for collateral review of errors of law committed by the trial court—the existence of any evidence to support the conviction . . . and other errors in trial procedure which do not cross the jurisdictional line.") (footnotes omitted).

Contruing *Sunal* in the recent case of *United States* v. *Travers*, 514 F.2d 1171, 1177 (2d Cir 1974), Judge Friendly stated for this Court that:

> "[W]e must take Sunal as meaning that when the error is one which can be rectified by proper construction of a criminal statute without resort to the Constitution, a claim that a conviction was had without proof of all the elements required by the statute is not a constitutional claim as that phrase is used in respect of collateral attack, and that, in consequence, collateral relief will rarely be accorded. . . ."

This points up the distortion inherent in Natelli's quotations from various cases to the effect that the failure of the Govern-

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this claim, any fair reading shows them to be wholly distinguishable and inappropriate to this case.**

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ment to introduce any evidence of an essential element may constitute a fundamental unfairness warranting collateral relief. These cases typically involved a trial conducted under a mistaken view of the law, so that the Government was not required to, and hence did not, put in any proof of some element (*e.g.*, in narcotics cases prior to the Supreme Court's decision in *United States* v. *Leary*, 395 U.S. 6 (1968), there was no occasion to put in any proof of knowledge of importation, since this was presumed). Consequently, once the mistake of law was identified, a Court could commonly say with little or no review of the record that there had been no evidence of an essential element, because at the trial it had not been recognized that any such proof was required. Here, by contrast, Natelli asserts no claim of legal construction, let alone of constitutional construction, but merely argues a claim of pure evidentiary insufficiency, requiring the same scanning of the record as was required of the Court in assessing his identical claim on direct appeal. No purely legal issues are raised at all. If, everytime a party disagreed with this Court's determination (following full litigation) of whether or not the evidence on a given element was sufficient, that party could bootstrap himself into a collateral attack by simply alleging that he regards the Government's proof of the particular element as not only insufficient but indeed as no proof at all (a claim Natelli can make here only through resort to what may charitably be called "blind advocacy"), then § 2255 becomes an open door to relitigating every ordinary question of evidentiary sufficiency—a result Congress could not possibly have intended. As Judge Friendly, said in *United States* v. *Franzese*, 525 F.2d 27, 32 (2d Cir. 1975), quoting Justice Stewart in *Machibroda* v. *United States*, 368 U.S. 487, 495 (1962): "The language of [§ 2255] does not strip the district courts of all discretion to exercise their common sense."

** The four § 2255 cases relied on by Natelli—*United States* v. *Loschiavo*, 531 F.2d 659 (2d Cir. 1976); *Robson* v. *United States*, 526 F.2d 1145 (1st Cir. 1975); *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974); and *United States* v. *Liguori*, 438 F.2d 663 (2d Cir. 1971)—all presented the typical problem of an intervening change of law that occurred after the direct appeal. Compare *Davis* v. *United States*, 417 U.S. 333, 342

[Footnote continued on following page]

B. The Government Introduced Ample Evidence of the Actual False and Misleading Nature of the Second Statement Charged Against Natelli

In any event, the Government's evidence of the false and misleading nature of the second statement charged against Natelli was more than ample. In this regard, it is important to note at the outset precisely what the Government was required to prove. For Natelli incorrectly suggests that the Government was obliged to establish the objective falsity of the so-called Eastern "commitment" referred to in the Mullen letter of August 14, 1969. (GX 18). While we submit that no such Eastern "commitment" ever actually existed, that the Mullen letter was an obvious ruse, and that the evidence at trial amply demonstrated all this, proof of these facts was not required to convict Natelli of the second specification.

Indeed, the Eastern "commitment" (let alone the Mullen letter) was nowhere mentioned in Count Two

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(1974). In addition, in only one of the four (*Travers*) had the issue in question been litigated on appeal, typically because in the prior state of the law such litigation would have been pointless. Also, in *none* of the four was any detailed review of the evidence required. In *Travers*, for example, the absence of evidence was conceded by the Government, and in *Robson* the trial court had made specific findings of fact. And, finally, in *all* of the four, the Courts included dicta (such as that already quoted above from Judge Friendly's opinion in *Travers*) strongly suggesting that § 2255 relief was not available in a situation like Natelli's.

Aside from these four, none of the other cases cited by Natelli on this issue involved collateral relief from convictions or any comparable situation. For example, *Harris* v. *United States*, 404 U.S. 1232 (1971), was actually a decision made by Justice Douglas alone, siting as a Circuit Justice, on an application for bail that was made pending the direct appeal of the underlying conviction to the Ninth Circuit.

(Jt. App. 9-11) charging Natelli with making false statements in a proxy statement. The Count identifies with precision the two false statements involved, the second charged statement being the nine-month earnings statement and, more particularly, the sales and earnings figures within it:

> "Said proxy statement also contained an 'unaudited' statement of earnings for the nine months ended May 31, 1969 which stated 'net sales' as $11,313,569 and 'net earnings' as $702,270. These figures were materially false and misleading. . . ."

Moreover, as the jury was properly instructed (following the language of the statute itself), it was sufficient if they found these figures either false *or* misleading.* Judge Tyler, in turn defined "false and misleading" for the jury in the following unchallenged terms:

> "The term or phrase 'false and misleading statement has been discussed. I point out to you that under the law a statement is false, of course, if it is untrue. A statement is misleading if it omits facts which are necessary to portray a true picture of the facts which are relevant. A statement is false or misleading if what is stated conceals or distorts a material fact so that the omission or failure to disclose creates or fosters a misapprehension as to the state of facts which are relevant.
>
> In this context keep in mind that sometimes a half truth is no better than an outright falsehood.

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* Natelli's brief—never once mentioning "misleading"— ignores the fact that there was ample proof from which the jury, even if finding the nine-month earnings statement literally true, could have found it entirely misleading because of what it failed to disclose about post-period adjustments and the dubious history of unbilled accounts receivable.

> A misleading effect may be created by half-truths. Indeed, a statement, though literally true, can nevertheless be false if it would create a false impression of the true state of affairs when interpreted by those who would read the statement in question." (Tr. 2362; Jt. App. 166).*

As we develop more fully below, the jury could well have found these figures in the nine-month earning statement false and misleading without ever considering whether in fact Eastern was committed to spending $820,000 on NSMC services in 1970. As Judge Tyler said shortly after this issue first surfaced at trial:

> "[Y]ou say that the Government is obliged to prove that** the EAL contract was no good. I

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* Judge Tyler further charged the jury, in accordance with this Court's decision in *United States* v. *Simon*, 425 F.2d 796, 805-06 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1967), that one test of whether the two specified statements were false or misleading was:

> "Were the quoted earnings figures and footnote set forth in Count 2 fairly set out? That is to say, did they fairly present the revenue and earnings picture for NSMC for the fiscal year 1968 and the first nine months unaudited of fiscal 1969?" (Tr. 2369; Jt. App. 168-69).

Judge Tyler added: "If you determine that there is nothing materially false or misleading about this information as alleged in Count 2, that would end your inquiry and you would be obliged to acquit both defendants." (Tr. 2369-70).

** In the transcript, though an obvious typographical error, the word "that" is typed as "it", so that the transcript ends: "[Y]ou say that the Government is obliged to prove it. EAL contract was no good." If the word "it" had actually been used, it would have no sensible antecedent; it could only have referred to what follows. Solely on the basis of what was actually an almost identical (and equally obvious) error regarding an "it", Natelli, before the District Court, constructed a multi-page argument to the effect that the Government had "deliberately misstated" the facts about the *Pontiac* commitment in its summation. Here, however, Natelli has at least the sense to confine this absurd argument to a footnote. (See Br. at 36 n.22).

am not sure that's right. That is not an essential element under this count as I see it." (Tr. 862-63; Jt. App. 62).

The Government established the false and misleading character of the nine-month earnings statement by two different lines of proof, each independently sufficient, although also corroborative of each other.

1. The Method By Which Unbilled Accounts Receivable Were Booked Was Both False And Misleading

The first line of proof was to show the totally misleading method by which NSMC continued to book, largely retroactively, future unbilled accounts receivable as earnings and sales of prior periods—despite the miserable "track-record" of such bookings.*

As noted, earlier, this "method", as devised and applied by Natelli, permitted NSMC, after the close of an accounting period, to retroactively book as actual sales and earnings the better part of certain alleged "commitments" from NSMC's customers to utilize NSMC's services in the *future* (and, concomitantly, to pay for these services in the *future*), even though NSMC had not itself booked these "commitments" on its internal books during the prior periods for which they were now being retro-

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* As stated in the Government's bill of particulars, as amended, "NSMC's Consolidated Statement of Earnings for the nine months ended May 31, 1969 materially overstates sales as a result of the improper recording of unbilled accounts receivable . . ." and, further, said statement "is materially false and misleading to the extent that it includes earnings relating to unbilled accounts receivable." (Appeal App. at A-79, A-103). Also, the statement "fails to disclose that the percentage of completion method of accounting as employed by NSMC had proven to be inappropriate and grossly unreliable. . ." (*Id.* at A-79).

actively booked by Natelli.* This retroactive booking was permitted, furthermore, even though no billable work had yet been done on any of these future commitments, and even though NSMC had no records of making any expenditures at all on these "commitments" so that both income and expenses had to be totally estimated. (GX 4B at E31 and 4C at E42; Tr. 723-4, 1974).**

This "method" was also based on the theory—never supported by the facts and never, indeed, investigated by Natelli—that, in Natelli's words as they appeared in the proxy, the "major portion" of the "work" done by NSMC "involves determination of the client's requirements and proposal by the company of an overall program." (GX 25). That is, the theory was that NSMC's "real work" was the relatively few hours spent in thinking up and making its sales pitch to its clients and that, accordingly, once the client had accepted the proposal, the actual implementation of the proposal could be wholly disregarded and the greater percentage of the anticipated earnings that were expected to be received following the implementation of the proposal could be recorded as income as to the date the client allegedly "committed" itself to the proposal.

Finally, the percentage of the total sales and earnings from each of these retroactively booked unbilled commitments was determined, not by ascertaining what expenditures NSMC had incurred in connection with the proposal (which, if any, were negligible), but rather by reference

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* Contrary to the impression conveyed in appellant's brief (Br. at 6-7), NSMC had never previously accounted in this fashion for any material amount of sales (GX 3 at E4) and, indeed, there were no unbilled accounts receivable at all on NSMC's books prior to Natelli's approval of their being booked. (Tr. 721).

** The transcript and exhibit references given in the following pages supplement those already given in the corresponding portions of the Statement of Facts, *supra*, pp. 4-17, to which reference should also be made.

to the percentage of hours the NSMC salesman who had made the "sale" claimed to have worked on putting his proposal together and making his sales pitch compared to the total number of hours he, as a salesman, estimated he would be working on the project altogether. (GX 3 at E10ff., and 4C at 5). This percentage, being solely a function of an estimate by the company's own salesman of the percentage of his time spent in getting the sale, inevitably came in very high.

Whatever dubious merits might be claimed for this "method" in the abstract, its practical effect as applied to NSMC's style of operations was to enable Randell to arrange, largely after the close of each fiscal period but before the results of that period had been reported to the public, to transform what would have been reports of large and increasing losses under ordinary accounting methods into reports of large and increasing profits. In September or early October, 1968, after Natelli's own staff reported, for the fiscal year ending August 31, 1968, a trial-balance loss of over $80,000, and NSMC's own internal staff reported an even larger loss of $232,000, Natelli, by agreeing to book previously unbooked, unbilled accounts receivable under his "percentage of completion" method, was able to retroactively book $1.7 million in "unbilled accounts receivable" and turn the loss into a handsome profit. NSMC promptly used this reported profit to buy up numerous new companies and to keep its stock (which had already gone in five months from $6 to $80 on the strength of Randell's claims that there would be these reported profits) skyrocketing still further. (GX 1, 2, 4C, 5; Tr. 148ff., 181-89, 192ff., 197ff., 712-17, 1601-08, 1829-39).

By the Spring of 1969, over $1 million of this $1.7 million in retroactively-booked future sales had proven illusory—as, eventually, did most of the rest—and, accompanied by various unverified alibis and explanations

as to why they had gone sour, had been written off NSMC's own books as uncollectible. (GX 13, 65-2, 65-14; Tr. 633-9, 736-41, Jt. App. 182, 323). But in the 1969 proxy, Natelli not only concealed these write-offs by subtracting them from the figures for the later-acquired companies instead of from NSMC's own figures (this fraudulent subtraction being part of the first false and misleading statement specified in the Count), but also permitted NSMC to go on retroactively booking more unbilled accounts receivable in the 1969 nine-month statement of earnings which, in turn, also proved illusory. Thus, utilizing a "method" that had shown itself wholly unreliable, Natelli succeeded in converting yet another actual loss into an even larger reported profit (these 1969 bookings constituting the second false statement specified in the Count). (GX 3, 10A, 13, 15; Tr. 222ff., 1221)

In short, while the jury could well have inferred that, from the outset, the accounting method applied by Natelli to NSMC's operations created false and misleading financial statements, the jury was certainly warranted in inferring that, by the time the nine-month earnings were calculated for inclusion in the 1969 proxy statement, it had been demonstrated that the "sales" and "earnings" thus calculated, based on unbilled, mostly retroactively booked, future commitments, were not "sales" and "earnings" at all, or certainly not "sales' and "earnings" of the period ended May 31, 1969, and that to employ that method in the nine-month earnings statement was to render the statement materially *false*.*

Additionally, the jury could have found that the average prudent investor looking at NSMC's highly

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* This, as we have already seen, was the express finding of Judge Gurfein for this Court on the direct appeal: "A true disclosure, which was not made, would have shown that without these unbilled receivables, [NSMC] had no profit in the first nine months of 1969." 527 F.2d at 318.

profitable nine-month earnings figures reported in the proxy would have received a materially *misleading* picture of NSMC's financial situation unless there had been disclosed to him such material facts (which were known to Natelli at the time and which were proven to the jury) as:

(1) $2 million of the $3.3 million in unbilled "sales" that had previously been booked under the same method used on the nine-months earnings statement had by this time been written off NSMC's books as no good. (GX 65-14; Jt. App. 182).

(2) The major unbilled "sales" booked under this system had been booked retroactively, after the close of the period for which they were booked. Not even NSMC's own internal books showed any evidence of the supposed "commitments" until not only after the close of the period in which the commitments had supposedly been entered into but also in many cases after the preparation of trial balances for the periods in question. (GX 1, 3, 4C, 10A, 12, 14, 15, 18, 40; Tr. 148, 222ff., 572, 714ff., 1149-50, 1221).

(3) The effect of the booking of these unbilled accounts receivable was, in every case, to transform what would have been a loss for the period in question into what was reported as a profit. (*Id.*; GX 65-2, 65-14).

(4) The "commitments," even the written ones, were commitments to pay NSMC in the future for distributional, promotional, and other marketing work that it was going to do in the future—often more than a year in the future. It was therefore extremely misleading to book these "commitments" under the theory that NSMC had already performed the bulk of its

work in putting together the proposal when that work was not the work for which the customers were (purportedly) committing themselves to pay. In fact, at one point Natelli and his staff determined that not only had no services been yet performed which obligated any client to pay NSMC any money on these "sales," but also NSMC salesmen were not even entitled to commissions for any such "sales." (GX 4C at E22; Tr. 1974, see also GX 16; Tr. 238-46).

(5) No expenditures had been made by NSMC which could be attributed to any of the "work" NSMC claimed to have performed on these "sales." And, needless to say, no bills had been sent out on any of these sales. (GX 4B; Tr. 723-4; and see references above).*

(6) Although labeled "percentage of completion" the percentage used to determine what portion of these "commitments" to book as sales and earnings of the periods in question had no relationship whatever to NSMC's performance of any obligations to its clients. Rather it was a function of each salesman's *estimate* of how many hours of *his* time (most of which, of course, were taken up in preparing and selling the proposal) were required on the project. (GX 3, 4C, 5).

(7) Prior to its first big booking of unbilled accounts receivable in late 1968, NSMC had never

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* Moreover, the use in the proxy (GX 25) of the terms "fixed-fee type contracts" and "contracts in progress" to describe these unbilled accounts receivable suggested even to the prudent reader an assurance of payment wholly at variance with the actual history of these unbilled "sales."

demonstrated any ability to perform work of this kind on this scale. In the intervening year up through the time of the filing of the proxy, NSMC had not performed work of this kind on this scale; rather, it had simply written off the previously-booked future "sales" before the time came for their actual performance. (GX 3, 65-14).*

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* In this regard, the underlying claim (which Natelli goes so far as to repeat here, Br. at 5) that, in the words of a footnote in the proxy drafted by Natelli, the "eventual implementation of the agreed-upon program is carried out principally by representatives and third-parties" (GX 25) and hence could be disregarded in trying to match the "sales" with the "work done by the company", was misleading in the extreme. First, as NSMC's written proposals (*e.g.*, NX-J) make clear on their face, it was for the implementation that the customers were committing to pay. Second, the "third-parties" were for the most part subsidiaries or subcontractors of NSMC and, in any event, NSMC was fully responsible for their performance, without which it could not collect on the sales. (*Id.*). Third, and most important, it was the alleged efficiency of its distributional "representatives," and most particularly its "network" of student "campus representives" with their "unique" access to the "student market" that was National Student Marketing's primary selling point. (*Id.*; GX 5, 25).

If, as Natelli now contends (*e.g.* Br. at 12-13, 21 n.14), contracts like Eastern were ultimately written off because of the alleged breakdown of NSMC's campus representative system, what business did Natelli have in booking sales and earnings for NSMC under a method that treated this obviously-then-critical phase of NSMC's operations as wholly irrelevant? Conversely, if the operations of the campus representative system were genuinely irrelevant to the performance of the Eastern contract, the failure of the campus representative system could not be, as Natelli here claims, the cause of the writing of that contract, but merely an excuse or alibi.

Given all this,* the jury could readily conclude that the continued booking of unbilled accounts receivable in the nine-months earnings statement in NSMC's proxy statement, without any of the above facts being disclosed, was materially misleading.

2. The Booking of Twelve Particular "Commitments" As "Sales" And "Earnings" of the Nine-Month Period Was Both False and Misleading

The Government offered a second line of proof as to the false and misleading character of the nine-month earnings statement, to wit, proof that specific "commitments" and the circumstances surrounding them cast sufficient doubt on their individual firmness and collectibility, especially as of May 31, 1969, as to make it false or misleading to book these particular items as "sales" and "earnings" of the nine months ending May 31 without at least disclosing their doubtful character. In this regard, it is important to remember that the second statement charged in the Count as being false and misleading was not, as Natelli would have it, a statement that any given commitment was in fact "legally binding" (as to which there was no proof offered by either side) or even a statement about the commitments themselves at

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* Additionally, the jury could have found that still further disclosures were required in light of the specific purposes to which the nine-months earnings figures were put. For example, as noted above, the Interstate board was told on August 12 of a Pontiac sale, and on August 14, Kurek, in Natelli's presence, read to Interstate the preliminary proxy figures showing the predicted profits for the nine months. But Interstate was never told, nor did the proxy reveal, that the roughly similar profitable figures in the final proxy reflected, not the Pontiac "sale", which had been written off, but a newly-discovered Eastern "sale," which had been substituted for Pontiac almost three months after the close of the pertinent period. (Tr 1059, 1070, 1077).

all. Rather, it was a statement about how much NSMC had sold and had earned as of a given period, and hence a statement of, among other things, when it was fair and proper to record unbilled future earnings from these commitments for future services, as sales and earnings of the period ended May 31, 1969.*

The Government, in this second line of proof, showed that it was false and misleading to include without qualification in the statement of sales and earnings for the period ending May 31, 1969 the following amounts attributable to the following twelve alleged "commitments": Barnes-Hind — $22,400; Campana — $21,900; Faberge — $53,775; Gossard — $53,775; Pace — $14,492; Carnation — $11,200; Barnes-Hind — $47,850; Bizaar — $5,580; Eastern — $27,000 **; Schick — $30,000; Tanya — $32,200; Eastern — $519,152. As to the first six of these, the Government's proof included the May, 1969 review of certain "commitments" by Natelli's immediate subordinate, Scansaroli, in which Scansaroli analysed the deficiencies of the back-up from an accounting stand-point of each one of these six contracts and commented as to each one either "delete," "write-off," or "no contract." (GX 13 at E102, E104, E105; GX 65-15 at E422; Tr. 736-41). Despite these recommendations, each one of the six was included in the proxy earnings figures for 1969.

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* For example, a contingent executory sales agreement might be perfectly vaild and free of fraud, yet to record it as present sales and earnings without in any way disclosing its contingent nature would in many cases be false, misleading and fraudulent. Thus, the jury could well conclude that, whatever else the Mullen letter of August 14 might be, it was not a valid basis for saying that NSMC had sales and earnings as of the previous May.

** This smaller Eastern "commitment" proved just as worthless as the larger $820,000 one, of which $519,152 was booked. Likewise, by the time of the proxy, seven Eastern "commitments", totalling over $40,000, that had been booked as part of NSMC's 1968 audited figures, had been (as Natelli knew) written off as worthless. (GX 3, 13, 15).

Next, the Government introduced a schedule that was prepared by another Peat accountant, Douglas Oberlander, based on his independent review of the underlying documents and back-up pertaining to all of the twelve "commitments" except for the final, large Eastern commitment, and including the six items earlier reviewed by Scansaroli (GX 65-15; Jt. App. 323). This review, moreover, was performed by Oberlander on August 15-16, long after the conclusion of the May 31 cut-off date for the period and at virtually the same time Natelli was considering Randell's sudden request to substitute the new, large Eastern "commitment" for the just-deleted Pontiac "commitment." (Tr. 1222-28). Oberlander's review reaffirmed Scansaroli's analysis as to the unbookability of the first six contracts; indeed, as to each of the four largest, he wrote the comment "bad." In addition, he determined that four of the other five items (not considered by Scansaroli) were also "bad," while the final item could not be booked in any event since it was simply a duplicate of a contract already booked. (GX 65-15).

Thus, two of Peat's own accountants had determined that eleven specific "commitments" totalling $320,172 (a material amount in terms of NSMC's figures) were worthless or at best uncertain and should not be booked. Nonetheless, they were booked, with Natelli's approval, as part of the nine-month earnings statement. From this proof alone the jury could reasonably have concluded that the nine-month earnings statement was false or misleading.

Finally, we come to the last of the twelve specific items shown to have been improperly booked as sales and earnings of the nine-month period: the Eastern "commitment," as to which Natelli concentrates so much of his fire.* Here, also, the Government's proof that the item

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* As the above discussion indicates, the Eastern "commitment" and the events at Pandick Press were not nearly so central a part of the case, or of the Government's proof, as Natelli here would make out. As Judge Tyler stated during the oral argument of Natelli's first new trial motion:

[Footnote continued on following page]

was a sham and should not, in any case, have been booked as sales and earnings of the prior period, was little short of overwhelming.

To begin with, as the Government pointed out on summation (Tr. 2296-97), this was the third time in less than a year that Randell, long after the close of the applicable fiscal period and just before NSMC was required to report its financial status to the public, had saved the day at the last minute by coming up with huge unbilled accounts receivable that had never been booked during the periods to which they allegedly referred. On the two prior occasions, the receivables, shortly after serving their purpose, had turned out to be sufficiently unfirm, not to mention uncollectible, as to require NSMC quietly (and, indeed, thanks to Natelli's footnote, secretly) to write them off the books.* The parallels between those earlier

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"The Court: I don't regard the Pandick Press business as being really the core of the Government's case. I regard the core of the Government's case as being the work papers and the financials on which your client worked. Sure, I think the Government was entitled to get into what happened at Pandick bearing on the knowledge and intent, if any, of Mr. Natelli. But you make it sound as if the crux of the case was the Eastern contract. Granted there was a lot of talk at trial about the Eastern contract, but I don't think it makes it the core of the case." (Transcript of Hearing of Dec. 20, 1971 at 5; Appeal App. at A-252).

* Specifically, it will be recalled from the Statement of Facts, *supra*, that approximately two months after the close of NSMC's 1968 fiscal year, at a time when Peat's preliminary figures for NSMC showed a loss, Randell suddenly came up with $1.7 million in retroactive "sales" that transformed that loss into a sizeable profit. These "firm" commitments proved unfirm, and unbookable, and most were written off the books over the next few months. (GX 65-5, 65-14). Likewise, approximately two months after the close of NSMC's next reporting period (the six-month period ended February 28, 1969), at a time when preliminary figures

[Footnote continued on following page]

occasions and this one were so precise as to more than warrant the jury, from this pattern alone, in drawing the reasonable inference that the Eastern letter was, likewise, not what it seemed, but was really a ruse devised for the momentary fraudulent purpose.*

It was in the context of this history that the purported Eastern "contract" suddenly surfaced, in an identical moment of crisis, and with all the tell-tale signs of being fabricated to fit the moment. As noted earlier, Randell was about to stage his greatest coup—the acquisition of six successful companies of which the largest, Interstate, had huge and genuine assets and earnings that could be (as they were) "pooled" against NSMC's internal losses so as to leave "NSMC" in the black and

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known to Natelli once again showed a substantial loss. (Tr. 222-23), Randell came up with a letter (GX 12) purportedly from Pontiac Motors, which, although dated April 28, 1969 (nearly two months after the close of the applicable period) purported to "confirm" Pontiac's "plans" for use of NSMC's services in *1970* to the tune of $1.2 million. Aside from the letter itself, there was not a single piece of paper from Pontiac in NSMC's files to substantiate that Pontiac had entered into such a commitment, let alone that it had done so prior to February 28. Nonetheless, the Pontiac "commitment" was booked, retroactively, as if it were firm and bookable, with the result that NSMC's six-month loss was transformed into a profit. (GX 10A, 13, 40). Within a space of less than four months, however, the Pontiac "contract" was written off the books. (Tr. 768).

* Pattern evidence of this kind is clearly an appropriate method of proving any relevant fact, for it is simply one reasonable form of circumstantial evidence. Here, as in *United States* v. *Monica*, 295 F.2d 400, 401 (2d Cir. 1961) (Friendly, *C.J.*), *cert. denied*, 368 U.S. 953 (1962), "[e]ach of the three episodes gained color from each of the others." Accord, *United States* v. *Wisniewski*, 478 F.2d 274, 279 (2d Cir. 1973) (Mansfield, *C.J.*). *Cf. United States* v. *Grady*, Dkt. No. 76-1201, slip op. 291, 303-04 (2d Cir., Oct. 27, 1976).

flying high. But the Interstate board, though impressed with the Pontiac "sale" and the NSMC profits fraudulently reported in its 1968 annual report (and re-certified by Natelli in the proxy statement, without any disclosure of the subsequent write-offs), was waiting for confirmation of NSMC's profit for the nine months ending May 31, 1969, that were due to be included in the proxy statement for the merger that was to be reviewed by Peat. (Tr. 1031-42). When on the evening of August 14-15, 1969 (after the latest profitable nine-month figures, including the Pontiac "commitment," had been read to the Interstate people), Natelli finally insisted at 1 a.m. that in the absence of firmer documentation Pontiac would have to be written off, Randell's response was to announce, at about 3 a.m., that NSMC had a commitment from Eastern Air Lines. Randell then asked would Mr. Natelli please be so good as to book it in place of Pontiac? (and thus keep NSMC looking profitable). (Tr. 258-59). Indeed, although the figures for Eastern were not identical to those for Pontiac, would Mr. Natelli please substitute one for the other without so much as changing a single figure from the ones just read over the phone to Interstate? (Tr. 1920)—a certain give-away as to what Randell was up to.

During the entire long evening prior to Natelli's making the final decision to delete Pontiac, had Randell peeped a word about this huge Eastern sale?—No. In his meetings with Interstate over the previous few days, in which he had told them about Pontiac, had he so much as hinted at the Eastern contract?—No. Had he ever mentioned to his chief financial office, Kurek that he had such a "commitment"?—No. Had he ever mentioned it to his comptroller, Buck, the NSMC man in charge of preparing the figures for the proxy?—No. These are the facts of record in this case. (Tr. 259-63, 654-55, 1038ff., 1146ff.; cf. 1104-05). And for all the labored and contrived attempts in Natelli's brief to disprove them, not by reference to anything in the trial record, but (as we document in Point II of our Brief, *infra*) by distortions

of matters entirely *dehors* the trial record, they remain the facts.

Natelli lamely responds to all this that this Court should abandon its common sense and treat the Eastern commitment as bona fide, because it is regular on its face. (Br. at 15). Indeed, Natelli would go so far as to have this Court be precluded, in assessing whether this latest "commitment" was chimerical, from taking into account what the jury and the Court (and Mr. Natelli at the time) already knew for certain: that the previous two times rabbits were seemingly pulled from Randell's hat, it turned out to be an illusion.

Whatever Natelli may argue now about how "regular" this commitment was "on its face," at the moment in question he recognized Randell's sudden production of the Eastern "commitment" for the illusion it was; for in a note that he made August 15, 1969, he himself described the proposed substitution as "really weird." (GX 21).* But he went ahead and booked it anyway. Moreover, the "weird" circumstances did not end with Randell's early morning announcement of a prior Eastern commitment. Later that same day Dennis Kelly arrived with a purported commitment letter in roughly the form Natelli had demanded. (GX 18; NX G; App. to Br. 4-5). Kelly was not the salesman in charge of NSMC's contacts with Eastern; that was Robert Bushnell. Rather, Kelly had been the man in charge of the ill-fated Pontiac "commitment." Moreover, the letter was dated August 14—the very day previous. What was Kelly doing with the letter (which was addressed to Bushnell), and how had Randell, who had spent the entire previous day in Chicago, from where he had flown directly to Washington, and then gone directly to Pandick Press, known about it at 3 a.m.?

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* In the same handwritten note, under the heading "Eastern Contract," Natelli wrote: "Wasn't booked [by NSMC]—obviously we're going back and doing something not intended." (GX 21).

Then, too, the letter (GX 18) was itself far from being as "regular on its face", as Natelli now claims. What, for example, does it mean when it says that Eastern "will accept and utilize during the fiscal year, 1970, an amount of not less than $820,000 for National Student Marketing Corporation's services"? What, indeed, does it mean that Eastern will "accept . . . $820,000"? Does it mean that Eastern is budgeting this amount, is committing to this amount, or what? Read literally, it means that Eastern is going to get $820,000 in cash from NSMC rather than vice versa and that can not be right. Similarly, *whose* "fiscal year, 1970,"—NSMC's or Eastern's? How many months would it be before NSMC would be called upon to even begin performing billable services, the profits from which were here being booked as of May, 1969?

Indeed, contrary to Natelli's repeated allegations in his present brief, the letter did not even adhere to the form (NX G) which Natelli at trial claimed he was told was the form of a "legally binding commitment" and which he was therefore allegedly insistent on.* The form, for example, specifically calls for the customer to confirm a commitment to "a gross billing to us of approximately $....." This language, however, is missing from the more ambiguous Eastern letter.

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* Although the Government believes it is rather doubtful, as a matter of contract law, that the language of the form—which was not labelled a contract but rather a "Program Committment Letter"—could be said to constitute a legally binding contract, the important point, contrary to Natelli's current assertions, is that there was no evidence anywhere at trial on the question of whether or not either this form or the Mullen letter of August 14, 1969 was a "legally binding contract." There was, to be sure, Natelli's own self-serving testimony that he *thought* it was a legally binding contract because that was what he allegedly had been once told by NSMC's general counsel, Davies. (Tr.

[Footnote continued on following page]

Perhaps most significant is that, while the form calls for no mention of the *date* of any prior verbal commitment, the very first sentence of the Eastern letter reads as follows: "This is to confirm our verbal commitment *given to you on May 14, 1969*" (emphasis supplied). Under the theory of the form representing a legally binding contract, there was no occasion to include the date of any prior verbal commitment, because such date was irrelevant; indeed, given NSMC's prior disastrous experience with verbal commitments, almost none of which had ever proven good, it was worse than irrelevant. What supposedly counted—if there were any truth to Natelli's claims about the purpose of the form—was the date of the written commitment, that is, the date the form itself was signed by the customer. But *that date*, in the case of the Eastern letter, was August 14—two and-a-half months too late to be included in the nine-month earnings figures.

1849). But, even on the question of Natelli's knowledge and intent, the jury was well warranted in rejecting this testimony as false, given, among other evidence, the following facts: (1) NSMC had standard form contracts that it used when it really had a contract with a client. (In this regard we are aware of no basis for Natelli's assertion (without citation) that the valid written contracts booked and billed prior to the inclusion of Eastern were "in identical form" to the Mullen letter [Br. at 27].); (2) there was no evidence that Natelli ever asked NSMC's outside counsel, White & Case, for its opinion as to the "legally binding nature" of the "Program Committment" form or the Mullen letter itself, even though several White & Case attorneys were present at Pandick Press on the night of August 14-15; and (3) most importantly, there was direct evidence that Natelli in fact knew that these letters were not legally binding commitments of payment, because when, at a meeting of NSMC's finance committee which Natelli attended in June, 1969, one of NSMC's officers remarked that NSMC was having better success in 1969 with its written "commitments" than with the prior verbal ones, Natelli, according to the partial verbatim transcript kept of the meeting (GX 16), responded:

> "Suppose we do run into problems . . . will you sue them? . . . doubt if you have a case."

The inference is unmistakeable, therefore, that the letter (unlike the form) put a date (May 14) on the purported prior "verbal commitment" in order to try to bring the "commitment" into the proxy figures ending May 31. And, of course, because it was the date of a "verbal" commitment, the accuracy of the date could not readily be checked.

Moreover, the need to depart from the form and insert a date for the verbal commitment, so as to bring the commitment within the nine-month figures, did not arise until late on the evening of August 14, when Natelli finally refused to go along with the booking of Pontiac. Indeed, not even Natelli in his present brief contends that anyone suggested including Eastern in the nine-month earning figures until after Natelli made the final decision on Pontiac. But if this is so, it is just one more circumstance proving that this entire letter was an after-the-fact concoction in a last minute (and successful) attempt to substitute something for Pontiac.*

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* Scrutiny of the Mullen letter reveals numerous other indica of fraud, but only one other need be mentioned here. Although purporting to confirm a verbal commitment given "on May 14, 1969," the letter elsewhere states that this is a commitment to utilize NSMC services offered in NSMC's proposal "*originally submitted on May 7, 1969.*" Is it credible that Eastern, which had bought substantially less than $150,000 of NSMC's services in 1968 and in 1969 (GX 65, cf. Tr. 1106), would make a firm commitment to buy $820,000 of NSMC's services way off in 1970 only *one* week after NSMC first ("originally") submitted its 1970 proposal to Eastern? Applying elementary common sense, the jury could surely infer that it was incredible that a company like Eastern would make such huge future commitments on such a spur-of-the-moment basis, especially when there was no necessity to do so from Eastern's point of view, since the proposal was for services that would not even be starting until 1970.

Further proof that the Eastern commitment was objectively false and misleading came in the documents, and lack of documents, that Natelli himself uncovered when he attempted, in the days immediately following August 14-15, to check NSMC's "back-up" on the Eastern "contract." All that he found was presented to the jury. (NX J; Jt. App. 184-225). As with other "contracts" booked under this remarkable system, there were *no* bills to Eastern and *no* records even of internal expenditures by NSMC on this "program." (Tr. 1141-50). Nor, as noted, had NSMC itself ever booked this "commitment" on its own books. (GX 21 . There was also not a single letter or other scrap of paper from Eastern to NSMC—although one certainly would have expected some correspondence about such a large undertaking. Nor was there even any internal memoranda from NSMC reflecting the obtaining of the commitment or the plans for its implementation. (Tr. 572, 1149-50).

There were, in fact, just two items, both of which were common to every NSMC attempt to make a sale, regardless of whether it succeeded, and neither of which demonstrated in the slightest degree that there had in fact been a sale. The first item was the time records of Robert Bushnell, the NSMC salesman in contact with Eastern. These "time logs," as can be seen (NX J; Jt. App. 186-209), simply carry the name of the client ("Eastern"), the name of the program or proposal being worked on ("1970 Youth Program"), and the number of hours worked (in whole numbers). Natelli calculated that Bushnell had worked 175 hours on the 1970 program altogether, of which 111 had been worked prior to May 31 (NX J; Jt. App. 184). Accordingly, he booked $519,152, or roughly 111/175 of the $820,000 Eastern commitment, as the percentage that had been "completed." But, of course, these records showed absolutely nothing about whether there was a commitment from Eastern at all,

let alone that it had become firm in May.* And Natelli, quite apart from never checking with Eastern, never even checked with Bushnell as to whether there was such a commitment.**

The only other scrap of paper was the NSMC proposal to Eastern itself. Being simply a proposal, it, too, in no way whatever confirmed that there had ever been a sale to Eastern or a commitment by Eastern. Moreover, as can be seen (NX J; Jt. App. 210-23), the proposal was couched in very broad, general, and clearly preliminary terms, with none of the proposed programs spelled out in any detail.

From the above facts the jury could readily infer that the Eastern commitment was a sham or that (and this was the most that was required) to retroactively book it as the unqualified sales and earnings of the prior period was, without fuller disclosure of the underlying facts, false or misleading.

3. There Is No Warrant For The Limitations Natelli Would Place on the Uses of Circumstantial Evidence

In an attempt to counter the weight of this considerable body of evidence, Natelli, in Argument I-A of his brief (Br. at 22-30) makes the following three-part argument. He argues that (i) virtually all of the afore-

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* If the proposal was completed in early May and committed to in mid-May, as the Mullen letter claimed, why did Bushnell, who was only a salesman, spend 64 hours on the program after May 31?

** The use to which Natelli put these time logs illustrates the absurdity of the entire system. If the time of Bushnell, the salesman, was the "real work" of NSMC for which Eastern was paying its $820,000, then Eastern was paying NSMC nearly $5,000 per hour of Bushnell's time!

mentioned proof of "suspicious circumstances" must be disregarded, because the Government relied on that proof to show Natelli's *knowledge* of the falsity of the second statement, and proof of underlying falsity must be viewed separately and distinctly from proof of knowledge; (ii) if this premise is correct, then the Government never proved the underlying falsity, and the "natural question arises: why?" (Br. at 27)—the answer to which Natelli says is that the "actual facts" now "known" show that the commitment was bona fide, or that, at least "it is a matter of considerable uncertainty whether the Government could have proved that the contract was not enforceable" (Br. at 27); and (iii) alternatively, the answer is that proving the underlying falsity "would have severly undermined the Government's case on the issue of [Natelli's] culpable knowledge" (Br. at 29) and therefore the Government "deliberately" withheld it.

No part of this argument can withstand even casual scrutiny. Parts (ii) and (iii) of the argument are, in fact, totally irrelevant, and appear to have been thrown in only in an attempt to color this Court's view by insinuating that the Government's proof was different from the "real" facts or that, alternately, the Government was out to mislead the jury. For if the Government proved that the second statement was in fact false or misleading, then Natelli has no cause to complain that we did not prove more. Alternatively, if the Government had in fact failed to prove that the second statement was false or misleading, *i.e.*, had failed to prove an essential element of the crime, there would be no occasion to go further and speculate as to the alleged causes of this failure. Consequently, while we shall briefly address the second and third prongs of Natelli's argument—the excess baggage—, we turn our primary attention to the first prong.

Natelli's first claim purports to be one of law: "Evidence of suspicious circumstances suggesting knowledge

of possible illegality cannot ordinarily do double-duty and also show the illegality itself." (Br. at 24). For this extraordinary proposition, Natelli cites not a single statement in any case from any jurisdiction. Rather, he purports to derive it from the fact that in two cases involving stolen goods, this Court, in finding the evidence sufficient, happened to light on separate pieces of proof in discussing the evidence of, respectively, the goods being stolen and the defendants' knowledge that this was so. From this happenstance, Natelli extracts his "principle."* He offers, however, no logical explanation why circumstantial proof should thus be limited to proving just one element exclusively. He overlooks, moreover, the endless stream of cases where this Court and other courts have considered circumstantial evidence as proving both an underlying fact and a defendant's knowledge of that fact. To give one example, in *United States* v. *Monica*, 295 F.2d 400, 401 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962), Judge Friendly found that the same circumstantial evidence sufficed to prove that the defendant possessed heroin, that he knowingly possessed heroin, and that he conspired to transport and sell heroin. Or, to give another example, in *Embree* v. *United States*, 320 F.2d 666, 668 (9th Cir. 1963), the court there held that "[T]he conduct of an accused person in seeking to flee following the commission of an alleged crime may be circumstantially relevant to prove both the commission of the act and the intent and purpose with which it was committed." See also *United States* v. *Baum*, 482 F.2d 1325, 1329 (2d Cir. 1973); *United States ex rel. O'Connor* v. *New Jersey*, 405 F.2d 632, 638 (3d Cir. 1969).

Indeed, some of the most direct refutation of Natelli's asserted proposition comes in the holdings of the very

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* Thus he states, "These cases reflect a basic proposition: notice to defendant that something is amiss may be a basis for inferring culpable knowledge, but only if the government separately proves the underlying illegality which the defendant is alleged to have known." (Br. at 26).

two cases from which he purports to derive his "principle." In the first, *United States* v. *Clark*, 525 F.2d 314 (2d Cir. 1975), the Court flatly stated that:

> "It would, of course, have been *impossible* for appellant to have *known* that the ring was stolen if, *in fact*, it had not been. *The latter is implicit in the former.*" 525 F.2d at 315 (emphasis supplied).

Similarly, in the other case on which Natelli mistakenly relies, *United States* v. *Jacobs*, 475 F.2d 270 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973), this Court approved an instruction to the jury that read:

> "*Knowledge* that the goods have been stolen may be inferred from *circumstances* that would convince a man of ordinary intelligence that *this* is *the fact*." 475 F.2d at 287 n.37 (emphasis supplied)

This is plainly a statement that the same circumstantial proof that warrants a reasonable juror in concluding the goods *were stolen* may be the very proof from which he infers that the defendant must have *known* they were stolen.

Not only is Natelli's proferred "principle" contradicted by his own authority, but logically it makes no sense. If a jury is warranted in finding from the numerous suspicious circumstances surrounding the making of a statement that a defendant knows it is false, it is precisely because those suspicious circumstances warrant the reasonable inference that the statement *is* false and that a person in the position of the defendant must know it to be so. And if, as in this case, the circumstances are so suggestive of falsity that the jury is warranted in inferring that a man could have disregarded its falsity only if he deliberately wanted to blind himself to such

falsity, then those same circumstances are natural, clear-cut circumstantial proof of the underlying falsity of the statement.

When all is said and done, Natelli's real quarrel is with the principles of circumstantial evidence as they have been applied since time immemorial. The Mullen letter of August 14, whether or not it appeared to be a commitment "regular on its face," came clothed in such suspicious circumstances and accompanied by such a history of similar "commitments" proving worthless that it was a reasonable inference that it was fraudulent and a sham. Natelli, in effect, asks for this Court to declare (on a collateral appeal no less) that the inference drawn by the jury was unwarranted, not because it was irrational, but because, like many a convicted felon before him, he prefers to believe it was erroneous. That is not the law and never has been. *E.g.*, *Holland* v. *United States*, 348 U.S. 121, 140 (1954).

Moreover, in assessing the circumstantial evidence, particularly in a case like the instant one, the jury, and this Court, need not look at the evidence with tunnel vision, isolating every particular circumstance surrounding the Eastern letter and asking whether that circumstance, by itself, shows the letter (or, more properly, its booking) to be a sham; indeed, on that kind of analysis most elements of most sophisticated crimes of this kind could never be proven circumstantially. Rather, as this Court has so often stated, "pieces of evidence must be viewed not in isolation but in conjunction," * and "the trier is entitled, in fact bound, to consider the evidence

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* *United States* v. *Stanchich*, — F.2d —, Dkt. No. 76-1407, slip op. 1277, 1288 (2d Cir., Jan. 6, 1977), *quoting United States* v. *Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

as a whole, and, in law as in life, the effect of this generally is much greater than the sum of the parts.*

Applying these principles, there is no reason at all why the same circumstantial evidence should not support a finding of more than one element of the same crime. Accordingly, there is no reason to disregard the Government's ample, albeit circumstantial, proof of the false and misleading nature of the nine-month earnings statement simply because much of that proof also warranted an inference that Natelli either knew it was false or was deliberately blinding himself to its obvious falsity.

Given this, there is really no occasion to consider here the other prongs of Natelli's argument, in which he advances his two allegations as to "why" the Government allegedly failed to prove the falsity of the Eastern "commitment." However, it may be noted that one of these two allegations—Natelli's claim that the Government did not prove the falsity of the Eastern contract because it could not, since the "actual" facts "now known" show that the question of whether or not the Eastern contract was valid is "problematical" (Br. at 15)—is addressed in part II-A of this brief, *infra*. As for the second allegation—which is that the Government failed to prove the falsity of the Eastern contract because to do so it would have had to introduce the secret Randell side-letter back to Mullen, which would have exculpated Natelli by showing that Randell and Kelly were keeping key information from him—the short answer is that the side

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* *United States* v. *Wisniewski*, 478 F.2d 274, 279 (2d Cir. 1973), quoting *United States* v. *Bottone*, 365 F.2d 389, 392 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966). Cf. *United States* v. *Bowles*, 428 F.2d 592, 597 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970) (where there is circumstantial evidence, an appeal court must indulge all permissible inferences favorable to prevailing party below).

letter was fully known to Natelli's counsel.* If its introduction would have exculpated Natelli, he would have introduced it. Moreover, the same facts were fully known to Judge Tyler (Jt. App. 12-18). Can it be true that he presided over a trial in which Natelli was, with the Court's connivance, convicted by the jury's receiving what Natelli's amicus here calls a "Kafkaesque" version of the events?** (Peat Br. at 2). And was the prior panel

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* Only if one were to read Natelli's present brief with minute scrutiny would one discover what is in fact a matter of record: that Natelli's trial counsel had full knowledge at the time of trial of all the relevant facts concerning Eastern. For example, Natelli's brief trumpets that, whether or not Randell's side letter back to Mullen rendered the Mullen "commitment" letter unenforceable, "What is not debatable is that appellant had no knowledge of the possible flaw (and neither did his jury)." (Br. at 16-17). Similarly, he states that "what is important is that there was not one word concerning the collateral transaction in the record before the jury that convicted appellant, and in fact, that collateral flaw was, as the government subsequently proved in a later trial, concealed from appellant as part of a conspiracy to deceive him." (Br. at 15). Anyone reading such sentences (and numerous similar ones throughout Natelli's brief) might conclude that Natelli, *by the time of his trial*, still had no knowledge of the side-letter, and hence could not introduce it for its allegedly exculpatory effect. But the fact is that Natelli's trial counsel repeatedly referred at various hearings and sidebars before and during Natelli's trial to the side letter and to Randell's design to keep it hidden from Natelli at the time of its delivery, thus evidencing Natelli's full awareness of this evidence. (*E.g.*, Tr. 73, 88, 848, 1342). Indeed, in his opening at Natelli's trial, counsel for his co-defendant, Scansaroli, expressly told the jury that "Cortes Randell stood before Judge Tyler and told Judge Tyler that he intentionally set out to defraud Natelli and Scansaroli." (Tr. 131-32). Having so stated, it was he and Natelli's counsel who then chose not to follow through by calling Randell to prove it. (Tr. 2125).

** In the same vein, Natelli, in his direct appeal brief, expressly accused everyone, from the Assistant United States Attorney who tried the case to the S.E.C.'s Chief Accountant, of "deliberate misconduct."

of this Court of Appeals, to whom Natelli on his direct appeal made the *precise same argument* about the Government's purpose in keeping out the side-letter,* also a party to this conspiracy? Indeed, since the side-letter was fully known to everyone at the time of trial, what we must have is a gross conspiracy by the Court, the Government, and even *Natelli's own counsel* to convict Natelli by putting a false picture before the jury!**

The fact is that the Government, having fully established the falsity of the Eastern contract, had no occasion to establish it further, especially through proof that would, in the Government's view, only have diverted the jury from the key issue before it, to wit, the facts of falsity that were known to Natelli. That Natelli professes to see in this a deliberate scheme to hide the truth only shows the lengths he will go to try to find an issue to put before this Court.

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* See, *e.g.*, the excerpts from Natelli's prior briefs at p. 24, *supra*.

** Natelli reaches the height of his hyperbole when he states: "*Any* evidence showing the lengths to which the NSMC conspirators and Mullen had gone to conceal from the auditors, including appellant, the secret *side letter* suggesting the *possible voidabiilty* of the commitment letter *undoubtedly* would have led the jury to repudiate the prosecution's thesis that appellant was a *knowing* participant in the fraud." (Br. at 29) (emphasis supplied). If the exculpatory effect of this evidence was so undoubtable, why did not Natelli's counsel, who (as the result of Randell's and Kelly's pleas, among much else) knew every bit of it, introduce it?

POINT II

The Government Did Not Present An "Erroneous Version of the Facts" To The Jury; It Had No Reason Or Obligation to Credit Natelli's Version; And Natelli Deliberately Chose Not to Present to The Jury The Testimony He Now Claims Corroborates His Version.

Natelli, in yet another attempt to re-litigate an issue raised by him on direct appeal and decided adversely to him, claims that the Government presented an "erroneous version" of the facts when it argued to the jury, on opening and summation, that one of the many obvious marks of the fraudulence of the Eastern "commitment" was its sudden appearance on the morning of August 15, 1963, in response to the belated deletion of the critical Pontiac "commitment". We maintain that (a) the Government's version is the correct one, and fairly stated the credible evidence, both as known then and as known now; (b) the Government never had any reason, obligation or occasion to credit Natelli's competing version, either as he presented it at trial in his own testimony or as he purports to present it now in the form of excerpts from Randell's subsequent testimony; and (c) Natelli, being fully aware at trial that Randell might corroborate his account and having deliberately chosen not to place such corroboration before the jury, cannot fault the Government for the failure of his own chosen tactics.

A. The Prosecution Fairly Stated the Facts, As Known Then and As Known Now.

At the outset, it is important to take note of just what Natelli is claiming when he says that the Government "presented" an erroneous version of the facts to the jury regarding Eastern. At trial, the Government attempted to re-created the circumstances under which

the Eastern "commitment" was first brought to Natelli's attention and then, shortly thereafter, retroactively booked by him, by introducing the following evidence: two eyewitnesses to the events (Kurek and Buck); Natelli's own notations concerning the events; and circumstantial corroboration for the inferences the Government drew from these eyewitness accounts in the form of both testimony (*e.g.*, Ball) and exhibits (*e.g.*, NSMC's internal records). In addition, the Government found in Natelli's own testimony at trial substantial corroboration for its own account.

Both Kurek and Buck testified that at about 1 a.m., Natelli made the final decision to delete the Pontiac "commitment" from the nine-month earnings figures. Randell, sometime between 3 and 5 a.m., then suddenly announced he had a "commitment" from Eastern and asked if it could be recorded in the figures in substitution for Pontiac. Kurek, who was NSMC's chief financial officer, testified it was the first time he had ever heard of such a commitment from Eastern. (*E.g.*, Tr. 259, 263). Buck, who was NSMC's comptroller and accountant in charge of putting the earnings figures for NSMC into the proxy, likewise testified that he had never before heard of such a commitment. (Tr. 654-55).

This account was confirmed by Natelli's own contemporaneous memorandum in which he noted that Randell's early morning suggestion to replace the deleted Pontiac "commitment" with this new Eastern one was "really weird." (GX 21). It was further corroborated by the fact that, although this Eastern "commitment" had supposedly had been given on May 14, a full three months earlier, it had never been booked in any form, no expenditures had ever been recorded on NSMC's books with respect to it, no bills had ever been sent out to anyone with respect to it, and nowhere in NSMC's files was there a single scrap of paper from Eastern referring to it. (Tr. 572, 1149-50). On the basis of this evidence, the

prosecution asked the jury to draw the inference that the Eastern "commitment" was an obvious ruse designed to replace the belated Pontiac deletion.

Although Natelli's counsel now asserts that Natelli's own version of these events was starkly different, the truth is that the version he gave when he took the stand at trial differed only minutely from Kurek's and Buck's account. He agreed with them that it was only in the late evening or early morning of the night at Pandick Press that the decision to delete Pontiac was finalized. (Tr. 1920, 2046-47). He agreed, too, that it was only after that deletion was finalized that Randell suggested booking the Eastern commitment in the nine-month earnings statement. (Tr. 1920, 2049). Natelli also agreed that Randell's suggestion went so far as to urge the flat substitution of Eastern for Pontiac without so much as a change in the figures, despite their differences. (Tr. 1920, 2050, 2059). He agreed, finally, that all he had done to check the bona fides of the Eastern "commitment," after the Mullen letter arrived, was look at NSMC's proposal to Eastern, talk to Dennis Kelly, and review Bushnell's time logs. (Tr. 1925-31; NX J). Indeed, about the only respect in which his account differed from Kurek's and Buck's was in his rather immaterial claim that he had a "vague recollection" that "*right prior*" to the meeting at Pandick Press he "believed" that Randell "may have mentioned that there was an Eastern contract which they *expected to be receiving* within days at that time." (Tr. 1913-14) (emphasis supplied). And Natelli admitted that even this remark by Randell was in the context of "conversations in which I was expressing to him my conclusion that the Pontiac agreement or Pontiac letter was not adequate for recording on the company's books." (*Id.*).

To the extent that this admittedly "vague" recollection was entitled to any weight at all, it was, in the Government's view, incriminatory to Natelli and supportive

of the Government's position, since it showed that as late as "right prior" to the Pandick meeting, NSMC was merely "expecting" to receive a contract or commitment from Eastern, and yet Natelli permitted NSMC to book it as if there had been a firm commitment since the prior May.*

At any rate, on the basis of the Government's evidence (let alone Natelli's admissions), the Government,

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* By contrast, in his present brief, Natelli, without ever actually quoting his testimony from trial, characterizes it (as he also did to Judge Owen) as follows:

> "Appellant testified that rather than having Eastern sprung on him at the printer's office, he had learned of it on a previous occasion, when *Randell had mentioned that Eastern had made a substantial oral commitment during the nine-month period in question* and that a formal commitment letter was expected shortly. (Tr. 1913-14)." (Br. at 37; emphasis supplied).

So that this Court may assess the accuracy of this characterization and Natelli's candor with this Court, we set out in full Natelli's direct testimony about Eastern at Tr. 1913-14. The Court can thus see for itself whether, for example, there is even a word of testimony about Randell's mentioning "that Eastern had made a substantial oral commitment."

> "Q. When did you first hear of any large commitment from Eastern Airlines, as best you can recall?
>
> A. I have a vague recollection that I heard about it sometime in August of 1969. I believe that I may have heard about it from Cort Randell during conversations in which I was expressing to him my conclusion that the Pontiac agreement or Pontiac letter was not adequate for recording on the company's books, and I believe at some point he may have mentioned that there was an Eastern contract which they expected to be receiving within days at that time.
>
> Q. Where did this conversation take place, as best you can recall it?
>
> A. I have a vague recollection it was mentioned to me by Randell during some telephone conversations in August.
>
> Q. Can you fix this conversation with relation to the time that you went to the printers in August?
>
> A. It would have been right prior to that occasion." (Tr. 1913-14; Jt. App. 88).

in opening and summation, argued that "the Eastern contract was known to be a complete phony * when it came up" because, among other things, no one had ever heard of there being such a sale or contract until early that morning of August 15 when the decision was made to drop Pontiac, thus creating a gaping hole in NSMC's about-to-be-reported earnings. (Tr. 2295).

Natelli does not claim that such remarks unfairly characterized the evidence at trial. Nor does he claim that the Government witnesses lied. Nor does he claim that, although on his own summation he offered the jury a different interpretation of these events (Tr. 2200ff.), the jury acted irrationally in rejecting his interpretation and accepting the Government's. Rather, his claim is that the Government's version was erroneous and misleading because it was "contrary" to the "true facts" which Natelli states are to be found in "Randell's testimony and the documentary proof introduced by the Gov-

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* So desperate is Natelli to impute to the Government some aura of bad faith or deliberate misleading of the jury that he five times argues in his instant brief (Br. at 15, 26, 27, 37, 40) that the prosecutor's use of the word "phony" invited the jury to believe that the Eastern letter was a forgery. We are not aware of any dictionary that gives "forgery" as a definition or synonym for "phony". Rather it is everywhere defined to mean "sham," "fake," "ruse," "fraud," and the like—precisely what the Government was arguing Eastern was known to be. Moreover, in making this argument, for the first time ever, in his instant brief, Natelli forgets that in all his prior papers he himself has consistently used the word "phony" to mean, nor forgery, but sham and ruse. For example, in his letter to this Court of Oct. 28, 1975, Natelli stated (at 6): "Our position here is that to sustain its charge that the Eastern commitment was *phony*, the Government was obligated to prove the existence of the side letter" (emphasis supplied). The side letter, of course, would tend to show that the Mullen letter was a fraud and ruse, but not a forgery. Finally, any doubt about the invalidity of Natelli's argument in this regard was eliminated by the District Court's opinion on this motion, which flatly labelled Mullen's letter as "the *phony* commitment letter." (Jt. App. at 227).

ernment at Mullen's trial" (Br. at 38), as further "confirmed" by Randell's pre-trial deposition in an SEC civil action. Coincidentally, these later-developed "facts" are said by Natelli nicely to corroborate his own version of the events surrounding the Eastern "commitment", as he claims to have presented it at trial. But then, Natelli says, this is no coincidence, for he "suspected" all along the Randell could give such corroboration "if he had been willing to talk to defense counsel and to testify truthfully." (Br. at 49). But Randell, he says, must have been giving this "truthful" version to the prosecutors all along, and consequently when the prosecutor urged a different version on the jury, he lied; or, as Natelli politely puts it, the Government argued "a version of the facts which information within its possession established as untrue." (Br. at 50).*

Upon the slightest analysis, this argument will be seen to rest on the assumption that Randell's testimony, then, later, now, or whenever, was and is entitled to be credited. But, as we will develop in subsection B, below, the Government has never had the slightest reason, occasion, or obligation to credit Randell. Preliminarily, however, it is well to lay to rest any suggestion that there is any other credible evidence to support Natelli's version of

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* Muting the shrill tone he adopted below, Natelli elsewhere purports to claim that he is entitled to relief even if the alleged "prosecutorial misstatements" were "perhaps made entirely innocently by the government attorney who tried the case" (Br. at 49). But, aside from the fact that such disclaimers ring hollow beside Natelli's accompanying accusations that the jury's function was "perverted" (Br. at 43) by the "false scenario crafted by the government" (Br. at 39), it is difficult to see why a perfectly innocent summary of the evidence by the prosecutor should render a verdict more subject to attack from newly-discovered evidence than otherwise, and Natelli is unable to cite a single case actually standing for such a proposition—let alone for his position, which is that such a summary, if "erroneous," constitutes reversible error even if the evidence that allegedly contradicts it is (as here) *not* newly-discovered.

the "true facts" relating to Eastern aside from Randell's testimony (if even it does). For, as noted, Natelli's brief also alludes to "documentary proof." But almost all the "documentary proof' referred to was introduced in the *Natelli* trial itself, and the little proof that was not so introduced was fully within Natelli's own possession at the time of the *Natelli* trial and hence fully at his disposal to combat any allegedly "erroneous" version urged by the Government.

For example, in summarizing what he claims to be the four most crucial "true facts" regarding Eastern, Natelli (Br. at 38) singles out (1) the submission of a proposal from NSMC to Eastern; (2) the expenditure of time on the proposal by Bushnell; (3) the signing by Mullen of the "commitment" letter of August 14, 1969; and (4) Natelli's having told Randell, prior to August 14, of the unacceptability of the Pontiac "commitment" in its existing form. But both the NSMC proposal and the Bushnell time logs were introduced by Natelli at his own trial (NX-J) and their *bona fides* were never at any time disputed by the Government. And, of course, the Mullen commitment letter was introduced at Natelli's trial by the Government, and the authenticity of Mullen's signature was never in dispute. Finally, the fact of Natelli's dissatisfaction with the Pontiac "commitment" having been voiced prior to the Pandick Press meeting was put before the jury in Natelli's trial not only in the form of an exhibit (NX H), but also in the form of testimony not merely from Natelli himself (Tr. 1914, 2047ff.) but from the two of the Government's own witnesses, Kurek (Tr. 518) and Buck (Tr. 653, 672-73); moreover, it was a fact that, again, was never disputed by the Government.*

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* A very large part of Natelli's motion papers below were devoted to a claim that he here relegates to a footnote (Br. at 36, n.22), to wit, the claim that the prosecutor, on summation, deliberately misstated the facts about the *Pontiac* commitment

[Footnote continued on following page]

In short, all four of the "true facts" singled out in Natelli's summary (Br. at 38) were before the jury in *Natelli* and, moreover, were undisputed. What *was* disputed, however, were the inferences to be drawn from these and other facts regarding the validity of the Eastern "commitment" and the propriety of booking it as sales and earnings of the previous nine-month period. The Government, for example, argued that the submission of a proposal (or sales program) and the expenditure of time on it (or sales pitch) showed nothing about

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by allegedly arguing that it was not until the morning at Pandick Press that Natelli had objected to the inclusion of the *Pontiac* commitment. This entire argument, which below was couched by Natelli in shrill accusations of deliberate prosecutorial misconduct, rested solely on his interpretation of an ambiguous "it" appearing in the transcript at Tr. 2295. While, as noted *supra* at 34, it is quite possible that "it" is a typographical error to begin with or that (for shame!) the prosecutor's grammar and usage may not have been perfect, it is at least clear that if the word was used, it referred, not to the Pontiac contract, but to the Eastern contract. This is apparent if one reads the entire paragraph in which the offending word appears (Jt. App. 125-26) and not just the two sentences quoted by Natelli, one of which is from the previous paragraph. (Indeed, in his opening to the jury, Natelli's counsel made the identical kind of error in reverse, there using the word "it" to refer to the Pontiac contract, when its immediate grammatical antecedent was the Eastern contract. (Tr. 103, line 4.))

Moreover, one thing is certain and that is the jury could not have been misled by the "it" even if it referred to the Pontiac contract. Both of the Government witnesses who testified about the Pontiac commitment, namely, Kurek and Buck, had quite expressly stated that Natelli's objections to the inclusion of *that* commitment antedated the Pandick Press meeting. (*E.g.*, Tr. 518, 653, 672-73; NX H). Thus, if the prosecutor had made the misstatement Natelli claims he did, Natelli's counsel would have objected (which he did not), and, in any event, the jury would have rejected the claim. Ironically, however, in the deposition that Natelli here claims is the "true facts," Randell testified that he *first* heard of Natelli's objections to including the Pontiac commitment at the Pandick Press meeting. (App. to Br. 8).

whether there had been a sale. Likewise, the fact that Mullen had signed the commitment letter was no guarantee of a commitment, in light of all the other circumstances suggesting fraudulence. And the fact that Natelli had earlier questioned the Pontiac commitment only showed that he, himself, realized that an otherwise unsupported scrap of paper was an insufficient basis on which to book a future commitment as a past sale, particularly given NSMC's history of "firm" commitments coming undone.

Natelli, to be sure, argued contrary inferences from these facts, but the jury rejected them, as later did this Court. See, *e.g.*, 507 F.2d at 321. Consequently, there is no basis at all for Natelli's claiming here that the Government was obliged to credit Natelli's inferences; and the only basis Natelli suggests is that Randell's later testimony not only allegedly corroborates his version but must be credited as true. In short, Natelli's argument always amounts in the end to a claim that Randell's testimony must be viewed as the "true facts."

This is even more apparent when one considers the "facts" other than those contained in Randell's testimony that Natelli claims were developed at the *Mullen* trial. One such "fact" repeatedly stressed by Natelli is that the Mullen letter of August 14 "really" was "a fully enforceable contractual commitment" (Br. at 15), qualified only by the side-letter back from Randell (giving Eastern the right to "cancel" the "contract"). The first thing to note about this argument is that Natelli made it at his own trial, arguing on summation that the Mullen letter was a valid commitment. (Tr. 2200-03, Jt. App. 90-93). But the jury found, from all the surrounding facts and circumstances, that whatever it purported to be on its face (and, as noted earlier, even there it is ambiguous), the surrounding facts and circumstances showed it to be a ruse and a phony. Turning then to the *Mullen* trials, it is hard to see how Natelli can maintain that

anything there independent of Randell's testimony buttressed his claim on this point. On the contrary, the introduction there of the side-letter (which, although fully known to both parties prior to Natelli's trial, was not thought appropriate by either side to introduce there), and the considerable proof that Mullen wrote the August 14 letter in return for hefty bribes,* can only be said to make the argument about the legal validity of the Eastern commitment much weaker than was even apparent at the *Natelli* trial. For surely it is the most elementary principle of contract law that a purported "contract" obtained by fraud and used for a fraudulent purpose is not the "legally binding," "valid," and "fully enforceable" contract that Natelli claims the Mullen letter to be. (*E.g.*, Br. at 15, 38). Corbin, *Contracts* §§ 6, 7, 8, 146 n. 32, 1457 (1962).

The next such "fact" alleged by Natelli is that Mullen (whom Natelli declined to call as a witness at his trial) had at least apparent and perhaps also actual authority to sign such a letter. (Br. at 16-17, n.13).** Natelli's suggestion that this is somehow inferable from the Government's evidence in the first *Mullen* trial (some eleven months after Natelli's trial) is one of the grosser distortions in his brief. The facts are that Mullen's immediate superior at Eastern, James Camissa, and Camissa's superior, Maurice Kelley, both flatly testified, at

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* Specifically, it was established at the *Mullen* trials that, shortly after Mullen signed the August 14 letter, he received from Randell via Kelly more than $100,000 worth of NSMC stock, followed later by $25,000 in cash. These facts are conspicuously absent from Natelli's account of the "actual facts" concerning Eastern.

** The distinction Natelli cites Judge Brieant as making in the *Mullen* case between "actual" and "apparent" authority is taken totally out of context. In the context of the *Natelli* case, it would be relevant, if at all, only to the issue of Natelli's knowledge and intent, which Natelli here claims he no longer contests.

both Mullen trials,* that neither Mullen nor even they had any authority to sign the August 14 letter and that, even though they normally were "copied" on Mullen's correspondence, they never saw the August 14 letter or any "confirmation" of any such "commitment" to NSMC. (Jt. App. 274-76, 281-84, 312-15, 316-319).

The next "fact" alleged by Natelli as coming to light at the *Mullen* trial is put as follows:

> "Later in 1969 an accountant on appellant's staff, whom the prosecutor held out as being careful and honest (JA 30, 105-106), confirmed the existence of the Eastern contract by contacting Mullen, Eastern's Manager of Special Markets, and found no reason to question his authority to make the commitment. Holding back evidence of that alleged defect in the Eastern contract thus spared the government from having to confront the flaw in its argument that in failing to confirm the Eastern commitment with Eastern itself, appellant had acted with reckless disregard for the truth." (Br. at 29).

Notice, first, that it is only by reference back to the record that one can discover who is the "accountant on appellant's staff" here referred to, namely, John Johnston. It would have been a bit more candid on Natelli's part to frankly tell this Court that Johnston was not only a witness at Natelli's trial (Tr. 893-980), but also that he was called by the Government (whom Natelli here claims was "hold-

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* Although one would barely know it from Natelli's brief, there were two Mullen trials, one for commercial bribery under the travel act in which the Court dismissed the case at the close of the Government's evidence on grounds relating to interpretation of the New York State statute there involved by virtue of the Travel Act, and a second, immediately thereafter, for perjury, of which Mullen was convicted for swearing to the Grand Jury that he had never received anything of value from Randell, Kelly and NSMC. The first Mullen trial is hereinafter referred to as "*Mullen I*" and the second as "*Mullen II*."

ing back") and was subject to Natelli's full cross-examination.

Note, also, that there is no citation to the record given for the allegation that Johnston "contacted" Mullen and "found no reason to question his authority to make the commitment." The reason there is no citation to the record is because it is not in the record of this or, to our knowledge, any other litigation. Mullen, certainly, never testified to it, nor did Johnston. What this appears to be, in fact, is a veiled and grossly exaggerated reference to one of a number of written form confirmations for various Eastern programs that Peat sent to Mullen in October, 1969 and received back from him, and that were introduced as GX 7 in the *Mullen* trials. Since these confirmations were directed expressly to Mullen's attention, rather than to Eastern, they show little, if anything, about his authority.* More importantly, these confirmation letters were not only fully available to Natelli prior to *his* trial but, indeed, they were received from Peat in the first place and were intimately known to Natelli. If these confirmation letters were exculpatory to Natelli, he had innumerable opportunities at trial to introduce them, as when Johnston was on the stand. He chose not to do so, and for this he now accuses the Government of "holding back." **

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* Mullen, for his part, denied knowledge of signing the confirmation that purported to confirm the $820,000 "commitment," and hinted that someone had taken his signature from another confirmation form and stapled it to a cover page referring to the $820,000 commitment. (*Mullen II*, Tr. 197-200).

** Finally, notice that Natelli, having raised this point in the context of the Government's alleged failure to prove the falsity of the Eastern contract, shifts, in his last sentence, to a claim that the Government held it back so as not to expose the "flaw" in the argument that Natelli "acted with reckless disregard for the truth." In other words, Natelli, having earlier disclaimed that he is here to reargue the sufficiency of the Government's evidence of Natelli's criminal knowledge, is really, under a thin

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Without multiplying endlessly the examples of the distortions and inaccuracies which pervade Natelli's Brief, reference may be made to one last "true fact" which Natelli alleges in support of his claim that the Eastern "commitment" really was valid: to wit, the claim, made at least four separate times throughout Natelli's instant brief (Br. at 12, 21, 28, 33), that the Eastern commitment "in fact . . . never was cancelled" by Eastern in whole or in part. (Br. at 33).

This assertion is both inaccurate and misleading. It is *misleading* because (as both Camissa and Kelly testified, *supra*) no one at Eastern except Mullen ever knew a "commitment" letter had been given to NSMC in the first place and therefore obviously no one else at Eastern could have been expected to cancel it. And since the "commitment" was written off by NSMC at the start of 1970, just when it was supposed to go into effect (and just after Mullen left Eastern to go into a private business venture with Dennis Kelly), no one at Eastern ever had occasion to know about it.

In addition to being misleading, the assertion is flatly *inaccurate*, for Mullen himself did cancel the "commitment" in substantial part, and also made clear that he did not regard it as ever having been a "commitment." Specifically, on December 15, 1969, or two weeks before the Eastern $820,000 "commitment" was due to take effect, Mullen sent a letter to NSMC, on Eastern letterhead, which read in full as follows:

> "With regards to my letter to you dated August 14th in which I *projected* our *expenditure level* for

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guise of raising a new question, back to arguing the very question to which Judge Gurfein devoted most of this Court's prior opinion. Indeed, in his direct appeal (prior to the *Mullen* trials) Natelli repeatedly adverted to the aforesaid confirmation in precisely the same terms that he uses here. See, *e.g.*, the excerpt from one of his pre-*Mullen* briefs at p. 24, *supra*.

> 1970, we as you know are undergoing severe budget reductions; and while my *estimate* was based on acceptable standards with regards to *projected revenue*, it is now our best *estimate* that the expenditures in 1970 will not exceed $400,000.
>
> If the market is responsive, as we believe it probably will be, there is a possibility that there could be adjustments in the budget; however, based on our current knowledge, the above estimate would hold true." (Jt. App. 322) (emphasis supplied)*

This document was introduced by Mullen himself at the second *Mullen* trial (Mullen Ex. I), where he also testified to the same effect. (*Mullen II*, Tr. 171).

In short, Natelli's account of the "actual facts" regarding the Eastern "commitment" are as inaccurate as they are irrelevant, and far from being supported, are actually contradicted by the documentary evidence at the *Mullen* trials. Indeed, not until his present brief had Natelli seriously contended that the Eastern commitment was in "actual fact" anything but a sham. The relevant facts, possessed by all parties from the outset of the *Natelli* trial, if not much earlier, made this obvious. As Judge Tyler stated during a side-bar at Natelli's trial:

> "I am aware that Eastern is a real soggy bag of nothing, as it turns out. We are all aware of that." (Tr. 1113).

In short, when carefully scrutinized, Natelli's argument that the "true facts" that later emerged support his version of Eastern comes down to nothing more or less than that Randell's testimony, as he construes it, must be regarded as the "true facts." It is to this claim that we now turn.

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* In fact, nothing remotely close to even this $400,000 figure was spent by Eastern on NSMC in 1970. See *infra* at 85.

B. The Government Never Had Any Reason, Occasion, or Obligation To Credit Randell

In claiming that Randell's later testimony requires this Court to reverse his conviction, Natelli appears no longer to claim, as he seemed to below, that Randell's testimony in these litigations constitutes newly discovered evidence (Judge Owen found that it did not), that the Government had violated its *Brady* obligations (Judge Owen found it had not), or that Natelli could not by due diligence have put this testimony before the jury at his trial (Judge Owen found that he could have). Indeed, in the penultimate paragraph of his brief, Natelli here admits that at the time of his trial, "appellant's trial counsel [who remains of counsel on this appeal] made a tactical decision not to call Randell as a witness to try to elicit the corroboration the defense suspected Randell could provide. . . ." (Br. at 49). Nor does Natelli appear any longer to claim, as he did on his direct appeal, that the Government had some kind of duty to call Randell as its witness; indeed, he now allows that "The government may not have had an independent obligation to call Randell in order to make appellant's defense. . . ." (Tr. 49). Rather, assuming *arguendo* that the Government knew in 1974 what Randell would say in 1975 and 1976, and further assuming *arguendo* that what Randell thereafter said was materially different from what the Government's witnesses said at Natelli's trial and corroborated Natelli's version instead, Natelli's position is reduced to the claim that Randell's version was the 'true" one and that the Government had some kind of responsibility to credit this admitted swindler and forger as against the witnesses who did testify at the *Natelli* trial. This bald assertion is backed by the same amount of legal authority and logical support as his earlier concocted "principles," *i.e.* none.

Natelli is never very clear about giving even a reason why the Government should be required to accept Randell's testimony at any time as the "true facts." At times he seems to argue that it is because the Government called Randell as its witness in its prosecutions of Mullen for commercial bribe receiving and for perjury and therefore allegedly "vouched" for him. This argument is fallacious for several reasons.

To begin with, as Judge Owen expressly found (Jt. App. at 228), simply because Randell was a Government witness did not require the Government to vouch for him. Fed. R. Evid. 607. Second, as Judge Owen also expressly found (*id.*), this was especially so here, since Randell was a hostile witness at both *Mullen* trials and the Government, having called him for the limited purpose of introducing his payments to Mullen, expressly disclaimed the rest of his testimony.*

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* Mullen's first trial (October 14-15, 1975, almost a year after the *Natelli* trial) was on charges of receiving commercial bribes from Randell in the form of NSMC stock in Randell's name that Randell had endorsed over in blank and had Kelly deliver to Mullen and also in the form of a $25,000 personal check signed by Randell and made payable to a shell corporation owned by Mullen. Consequently, the Government had no choice but to call Randell as a witness in order to introduce and authenticate the check and to establish the transfer of the stock. Beyond those key facts, the Government did not for one moment purport to vouch for Randell's typically ambiguous, self-serving version of the events in question. Indeed, as the District Court (Judge Brieant) remarked with regard to Randell's volunteered characterizations of events on his direct testimony, "It looks to me as if this fellow gave highly exculpatory testimony [to Mullen], if believed." (*Mullen I*, Tr. 111). At any rate, on re-direct examination, the prosecutor subjected Randell to rigorous and hostile questioning, finally eliciting Randell's admission that, contrary to what he had sworn to a few minutes earlier, he knew the payments to Mullen were "improper". (*Mullen I*, Tr. 110). [At the time of his guilty plea (prior to Natelli's trial) Randell had

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Furthermore, even if the Government could somehow be held bound by everything Randell volunteered at the *Mullen* trials, the fact is that, for all his patent lies, evasions, and distortions, nothing he said at those trials contradicts in any material way the statements about the Eastern "commitment" made by the prosecutor on summation in the *Natelli* trial, to wit, that no commitment from Eastern had existed (let alone been known to Natelli) prior to the night at Pandick Press, August 14-15. Specifically, in his testimony at *Mullen I*, Randell, after describing a conversation with Kelly "around the second week of August, 1969" (*Mullen I*, Tr. 23),* testified as follows:

> "Q. Mr. Randell, at the time you had this conversation with Dennis Kelly or prior to that, did you know of *any commitment* from Eastern Airlines to spend $800,000 with National Student

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characterized his commerical bribes as "giving things of value to (clients' executives) so as to continue a favorable business relationship with their companies." (Appeal App. at A-124-25).]

Similarly, at the second *Mullen* trial, where Mullen was charged with perjury in having sworn to the Grand Jury that he had never received anything of value from Randell, Randell was again called for the limited purpose of establishing the payments to Mullen; and once more was subjected to rigorous cross-examination by the prosecutor. And since, unlike the first trial, this trial went to conclusion, the prosecutor this time had the opportunity of summation to disabuse forever, and at some length, any notion that Randell was a friendly witness or one whose testimony the Government found generally credible. (*Mullen II*, Tr. 348-49; Jt. App. 320-21).

* At pages 18-20 of his instant brief, Natelli takes excerpts from what was originally eight pages of Randell's testimony (*Mullen I*, Tr. 42-49), and, by adroit use of ellipses and quotations out of context, makes it appear that Randell testified in a way very differently from the way he did. For example, the conversation with Kelly is quoted in such a way as to make it appear that it occurred long before the Pandick Press meeting, whereas the date actually put on it by Randell, which Natelli leaves out, makes it contemporaneous with the Pandick meeting.

> Marketing in 1970? A. No, other than, as I know, other than the fact that Mr. Mullen had agreed to the program, but that is all. That is all I knew. That Mr. Mullen had agreed to go ahead with the program back in May." (*Mullen I*, Tr. 48-49) (emphasis supplied).

Lest there be any ambiguity in what was understood by Mullen's "agreeing to go ahead," the prosecutor put the question again:

> "Q. Were you aware of *any commitment* of Eastern Airline at that time? A. No." (*Mullen I*, Tr. 49) (emphasis supplied).*

Further, to make doubly sure that Randell was not implying that Mullen's alleged "go ahead" could be construed as even a verbal commitment from Eastern itself, the prosecutor, after introducing the Mullen letter of August 14, 1969, asked Randell the following:

> "Q. To your knowledge, was there *any commitment, oral or written,* from Thomas Mullen or Eastern Airlines to spend $820,000 with National Student Marketing Corporation in existence as of May 14, 1969? A. *Not from Eastern.* Tom said that *he wanted* to do the program, but other than he, I knew of no commitment from anybody else, no." (*Mullen I*, Tr. 52-53) (emphasis supplied).**

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* Natelli ends his three pages of excerpts from Randell's testimony just above this last question and answer.

** Presumably not even Natelli, who does not quote the above testimony, would contend that Mullen's saying he "wanted to do the program" would be a sufficient basis on which Natelli could book Eastern as of May, let alone sufficient to make it what Natelli here defines as a commitment, namely, a "legally binding contract."

In sum, the very best that Natelli can make from Randell's testimony at *Mullen I*, is, not that there was any commitment from Eastern, written or oral, that had ever surfaced anywhere prior to the Mullen letter of August 14, but that, at most, Mullen had said that he personally "wanted to do the program." And even this avails Natelli nothing, because nowhere in Randell's testimony is there the slightest suggestion that this alleged desire on Mullen's part was ever communicated to Natelli in any form prior to the magical surfacing of the Eastern "commitment" at 3 a.m. at Pandick Press.

Finally, any possible ambiguity on this score was eliminated at the second *Mullen* trial, two days later, where Randell withdrew his prior qualification and testified regarding the Mullen letter of August 14, 1969 simply as follows:

> "Q. Prior to your receipt of this letter . . . did you know of *any commitment* from Eastern Air Lines to spend this amount of money . . . ? A. No." (*Mullen II*, Tr. 34).

Confronted with this double difficulty that, in the *Mullen* trials, Randell's testimony did not contradict what the prosecutor had said at the *Natelli* trial and that, even if it had, it was volunteered by a witness for whom the Government in no way vouched except as to his having made certain payments to Mullen, Natelli, in a footnote to his present brief, tries to alter his stance, stating:

> "The government argued below that it did not 'vouch' for Randell's testimony at the Mullen trial, in which the government apparently considered him a hostile witness. . . . But this observation surely misses the point. The important fact is that the Government's opening statement at the Mullen trial (JA 237-249) affirmatively forecasts the version of the facts the prosecutor elicited on *direct* examination of Randell." (Br. at 39 n. 24) (emphasis in original)

With this bit of sophistry, Natelli at first seems to say that the Government's not vouching for Randell "misses the point" [why?], but then goes on to claim that the Government did seem to vouch for him, or to treat his account as the correct one, in that the prosecutor's opening statement "affirmatively forecasts" [whatever that means] what Randell volunteered on his direct testimony [which part?], before the Government began in effect cross-examining him on re-direct. If, as Natelli says, this is "the important fact," one would have thought that, instead of merely citing to the Government's entire opening ("JA 237-249"), Natelli would have quoted, or at least made a more specific reference to, some point in the opening where the Government "affirmatively forecast" Randell's testimony in some manner inconsistent with the statements made by the prosecutor in the *Natelli* trial that Natelli claims were "erroneous." But no such quotation or reference is given, because there is none. Indeed, the prosecutor's opening statement in the first *Mullen* trial, to the extent that it touched at all on the same subject matter as the statements in *Natelli*, is wholly consistent with what the (different) prosecutor stated in Natelli.

Perhaps aware of the poverty of his claim that the Government ever affirmatively adopted Randell's testimoney in the *Mullen* case, Natelli next advances the extraordinary claim that the Government is bound by Randell's testimony if it simply acquiesced in it: "The government cannot be heard to deny the accuracy of Randell's testimony at the Mullen trial without pointing to something of record showing a different version to be the truth." (Br. at 39 n.24). Aside from the absurdity of this proposition as matter of law and logic (—why should any party to a litigation be bound to accept as binding on him in that litigation the testimony of a crook and a liar at another litigation simply because there is nothing affirmative of record to refute some of

the liar's lies?—), it cavalierly overlooks the fact that the proof which really is "of record" in this case—namely, Kurek's testimony, Buck's testimony, Ball's testimony, *etc.*, proof not at some other trial but at the *Natelli* trial itself—directly refutes Randell's testimony in *Mullen* as Natelli interprets it. (And where it does not refute it, that is precisely where nothing in Randell's *Mullen* testimony materially differs from what these *Natelli* witnesses said.)

Finally, then, given this utter lack of evidence that the Government at any time adopted (either affirmatively or by acquiescence) Randell's account in *Mullen*, or that that account in any material way was inconsistent with anything the prosecutor said in *Natelli*, Natelli plays his last card—one previously held back even from the District Court—and contends that, Randell's testimony in *Mullen* aside, the really "true facts" are to be found in a pre-trial deposition Randell gave some 18 months after the *Natelli* trial as a private party defendant in an SEC civil action; and, moreover, that the Government, even though it did not call Randell for that deposition or "affirmatively forecast" what he would say, must nevertheless accept as true what Randell said in that deposition, solely because in that suit a representative of the SEC totally unassociated with the *Natelli* prosecution who happened to be present at Randell's deposition did not interrupt and call Randell a liar. Or, as Natelli puts it, "the government, which was represented through counsel for the SEC at Randell's deposition, did not contest his version of the circumstances surrounding the Eastern contract." (Br. at 39, n.24).*

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* A word must regretfully be said about the propriety of Natelli's use in this litigation of Randell's deposition. Although Randell's deposition was taken weeks, even months, before Natelli filed his final papers with Judge Owen on the instant motion, Natelli nowhere sought to put it before Judge Owen

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This last-quoted sentence simply illustrates the ability exhibited in Natelli's brief to combine misstatements of fact with unsupported propositions of law to arrive at an illogical and unreasonable result. First, as to the law, there is no authority whatever for the extraordinary suggestion that where, as here, the SEC as plaintiff brings a civil action (*SEC* v. *NSMC, et al.*) against

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so that the District Court could make findings as to its relevance, if any. This, mind you, in spite of the fact that it is clear from the questions put to Randell by Natelli's counsel at the deposition that Natelli's counsel (who represents the amicus Peat here) was improperly using the occasion to try to fish for material supportive of Natelli's new trial motion (*e.g.*, what Randell had allegedly told the prosecutor in *Natelli*). Moreover, when Natelli's counsel and the Government, shortly before he filed his present brief to this Court, entered into a stipulation of what the record on this appeal should contain, no request was made by Natelli's counsel to include this deposition, indeed, no mention was made of it at all. Natelli then goes and annexes to his present brief, not the entirety of Randell's deposition, but the few pages of cross-examination by Natelli's counsel that he feels supports his position to this Court; and he purports to justify this by asking the Court to take "judicial notice" of the deposition. (Br. at 21, n.14). The Government respectfully submits that this is no different from an attorney annexing to his appellate brief a part of an affidavit from some third party, which he held back from the District Court and then asking this Court to reverse the District Court on the basis of this partial, wholly unlitigated piece of paper.

Nor should Natelli be permitted to place this deposition into "evidence" before this Court by a facile reference to "Rule 201(f), Fed. R. Ev." (Br. at 21, n.14). Judicial notice under Rule 201 can be taken only of "adjudicative facts," that is, facts "not subject to reasonable dispute." While the Government does not dispute that Randell gave a deposition, we do dispute both that the small portion of his deposition presented here by Natelli fairly represents what Randell said and, more importantly, that anything he said there can be taken as accurate—yet these are precisely the purposes for which Natelli offers the deposition here, claiming, indeed, that the Government "cannot be heard" to dispute Randell's lies.

numerous defendants, and one of those defendants (here Randell) gives a pre-trial deposition and is cross-examined by another one of the defendants (here Natelli), what that defendant says in response to the co-defendant's questionings is binding on the SEC, let alone on another branch of the Government, unless the SEC representative immediately "contests it." Second, as to the facts, the SEC in fact did contest what Randell said in his deposition, but at the appropriate place and time. Specifically, when the SEC, following Randell's deposition, filed its pre-trial brief in this civil case, setting forth what is expected to prove against Randell, Natelli, and other defendants at the future trial of the case, it wholly rejected the account given by Randell at his deposition and adopted instead the account urged by the prosecutor in the *Natelli* trial.*

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* Thus, for example, the SEC pre-trial brief recounts that:

> "At about 3:00 in the morning of August 15, 1969, shortly after Randell, Kurek, Natelli and Scansaroli arrived at Pandick Press, Natelli and Scansaroli told Randell that the $1 million Pontiac 'commitment' would have to be written off, and, in fact, it was written off. Randell thereupon told Natelli that he had a 'commitment' from Eastern Airlines, in a similar amount, also attributable to the nine-month period. At about 4:00 a.m. on August 15, Randell called Dennis Kelly, the NSMC salesman who had been responsible for the $1 million 'commitment' of Pontiac, and asked Kelly to provide Kurek, who was also on the telephone, with information concerning the Eastern 'commitment.' Several hours later, a 'commitment letter' from Eastern Airlines dated August 14, 1969 was brought to Pandick Press. The letter purported to represent an $820,000 commitment from Eastern Airlines that had been entered into in May, just prior to the end of NSMC's nine-month period. Thereafter, Natelli and Scansaroli agreed to permit NSMC to include the Eastern Airlines 'commitment' in NSMC's nine-month financial statements.
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> * * * * *

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In addition, the Randell deposition is so riddled with demonstrable inaccuracies that we are frankly surprised that even Natelli should undertake to assert that it represents the "true facts." For example, in response to the question of Natelli's counsel about "When did you for the first time hear of Mr. Natelli's disagreement" with the inclusion of the Pontiac commitment in the nine-month figures, Randell responded: "I don't recall hearing that before the Pandick Press meeting, but I could be wrong on that." (App. to Br. at 8). Yet (as noted *supra* at 67) if there was one fact on which both Natelli and the Government's witnesses in the *Natelli* trial were in full accord, it was the fact that Natelli had made known his disagreement with the inclusion of Pontiac in NSMC's nine-month figures on several occasions prior to the Pandick Press meeting. And even giving full allowance for the passage of time and the fact that Randell hedged his answer, there really cannot be any serious question—given the very great importance of the Pontiac figures at the time—that Randell was prevaricating in this answer in order to limit his own liabilty.

In notes which Natelli prepared at the printers on the night when the Eastern Airlines 'commitment' was presented to him, he stated it would be 'really weird' to replace the Pontiac 'contract' with the Eastern 'contract.' Scansaroli thought it 'strange'. . . . The switch from Pontiac to Eastern represented the third post-period 'adjustment' to NSMC's books. The first had been the booking of $1.7 million of 1968 'sales' which had been included in NSMC's 1968 financial statements two months after the close of the year. The second was the $1.2 million purported Pontiac commitment of which over $900,000 was included in sales for the first six months of 1969, two months after that period. In all three cases, by the last minute inclusion of unbilled 'commitments,' NSMC was able to transform a loss into a large, publicly reported profit." *SEC* v. *NSMC et al.*, U.S. District Court, District of Columbia, Civil Action No. 225-72, SEC Pre-trial Brief, at 21-23 (12/6/76).

Similarly, although at the time of his guilty plea (Jt. App. 15-18), and again at the *Mullen* trials (e.g., *Mullen I* Tr. 75-76), Randell had admitted to forging the Pontiac "commitment" (specifically by having new words typed in and xeroxing the changed version so that the changes could not be detected) and to doing all this with criminal intent, in his deposition he falsely tried to put all the weight on Kelly.*

Most of the rest of Randell's deposition can similarly be shown to be false on its face.** In addition, as already noted, it is wholly inconsistent with his testimony at the

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*. . . I discussed it with Dennis and my understanding at the time was that he had gotten Jim Graham's [the signatory on the original letter] permission to insert the words 'we plan to' rather than 'we are considering.' This is the time that I participated in the xeroxing of the change because Dennis said there was not enough time to get another letter from Jim and I thought we had Jim's permission to make that change.

* * * * *

Q. Do you know what happened to it? A. I assume Dennis had it. At the time we changed it, I was told by Dennis that there was nothing illegal about changing a letter if we had the permission of the writer to do so." (App. to Br. at 9-10).

** To give just one more example, Randell says as to the Eastern "contract" that "My recollection was that we actually performed a portion of the contract that we were supposed to in the fall of '69. . . ." (App. to Br. 12). And indeed Natelli adopts this in his present Brief as accurate, stating at least three times, without other authority, that "NSMC rendered part performance" on the Eastern "contract" (Br. at 21 n.14; likewise at 16 n.13 and at 28). But all the credible evidence of record refutes Randell's claim. The proposal itself (NX J) makes clear on its face that the services called for are to be performed in calendar 1970. NSMC's internal accountant in charge of fixed fee bookings testified on voir dire that, as of January, 1970 (or very shortly before the Eastern "contract" was "written off"), not one penny had been billed on it. (Tr. 1106). And Peat's own records, introduced by a Peat employee as GX 16 at the first *Mullen* trial, showed that, as of late October, 1969 (which is the furthest the

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Mullen trials. Of particular relevance here is the fact that, whereas at the *Mullen* trials, as quoted above, Randell repeatedly and flatly testified that he was not aware prior to August 14, 1969 of any commitment from Eastern Airlines itself, at his deposition Randell claimed to have been aware of such a commitment from May, 1969 onward. (App. to Br. 11).* How then can Natelli possibly contend that Randell's utterly different testimony at these separate proceedings (the *Mullen* trials and the civil suit) both represent the "true facts"?

In candor, Natelli should acknowledge Randell's testimony, and particularly his deposition, for the tissue of lies it so clearly is, rather than attempting to find fodder for his own claims in the repellant suggestion that Cortes W. Randell speaks the truth. At the least, it is unseemly and absurd that he should urge the proposition that Randell's lies are binding on the Government and, indeed, on this Court.

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records went), not only had nothing been billed on the Eastern "contract" but also not one penny had been expended by NSMC, so that all costs had to be "estimated" (*Mullen I*, GX 16 at F-1.1). Thus, the facts are that, not only was there no performance of the Eastern "contract" at least through mid-October, 1969 and no evidence of performance thereafter, but also every penny of both the income NSMC thought it would receive *and* the expenses it thought it would have to make had to be estimated. Yet, under Natelli's "method" of accounting, the bulk of this "contract" had already been booked as NSMC's "sales" and "earnings" of the period ended May 31, 1969.

* Natelli purports to see in this latter claim great corroboration for his own testimony at trial, wholly overlooking the essential absurdity of Randell's allegedly knowing of a huge commitment in May and yet never mentioning it to Natelli until "right prior" to the Pandick meeting in mid-August.

C. At His Trial, Natelli Had Full Knowledge That Randell Might Corroborate Natelli's Version of Eastern; Having Deliberately Chosen Not To Call Randell, He Cannot Now Fault The Government For The Consequences of His Own Preferred Tactics.

Aside from the entire lack of either legal or factual support for Natelli's argument about Randell's testimony, it is based on a premise fundamentally at odds with the apportionment of responsibilities inherent in an adversary system of justice. For Natelli's claim is nothing less than that a defendant's counsel, with full notice that there exists a witness whose testimony might arguably corroborate his client's account, can, after deliberately electing not to call that witness, turn around on appeal and argue that the resulting "error" in the picture put before the jury was the fault of the Government. Judge Owen promptly rejected this claim:

> "The basis for Natelli's claim that he is entitled to a new trial is prosecutorial 'misstatements' during the trial and summation that are allegedly contradicted by testimony of codefendant Cortes Randell, former president of National Student Marketing Corp., given some eleven months later as a witness at a trial of Thomas E. Mullen, the Eastern Airlines executive who wrote the phony commitment letter.
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> * * * * *
>
> Natelli, when he took the stand at his trial, testified that he had told Randell and others prior to the night at Pandick Press that he would not allow the Pontiac 'contract' and also that he had heard about the Eastern proposal sometime 'right prior to' the night at Pandick. These two facts, testified to by Natelli and others, are the substance of the 'newly discovered evidence.' That Randell may have corroborated that testimony does not

make the evidence newly discovered. Natelli was present at some of the conversations with Randell. Further, Natelli had the transcripts of the allocutions of Randell's and Kelly's (another codefendant) guilty pleas. Natelli argued on appeal—this prior to the *Mullen* trial—and in his petition for rehearing that the government deliberately chose not to call Randell, whose testimony would have exculpated him. [Consequently] the 'evidence' is hardly newly discovered.

While, as was his right, Randell refused to speak with defendants' counsel prior to trial, Natelli was still free to call him as a witness.* He could also have interviewed and called other co-defendants who had pled guilty. He chose not to as a tactical decision. Natelli has failed to meet his due diligence burden. *See United States* v. *Tramunti*, 500 F.2d 1334, 1349 (2d Cir. 1974); *United States* v. *Ruggiero*, 472 F.2d 599, 604-05 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States* v. *Brawer*, 367 F. Supp. 156, 174 (S.D.N.Y. 1973), *aff'd*, 496 F.2d 703 (2d Cir. 1974)." (Jt. App. 227-29).

The same considerations render moot Natelli's demand for a hearing to determine whether the Government had learned from Randell, prior to Natelli's trial in 1974, the statements Randell testified to at the *Mullen* trials in

* Natelli, despite an express invitation from the trial court to "intervene for the defendants or either one of them who wanted to call [Randell] since he is under the control of this Court in this case" (Tr. 1343), did not so much as subpoena Randell, let alone call him. As this Court has stated, "The only way adequately to establish unwillingness of a witness to testify is to compel the presence of the witness and test the question before the Court." *United States* v. *Sanchez*, 459 F.2d 100, 102 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972). Accord, *United States* v. *Zane*, 495 F.2d 683, 699 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974).

1975 or the statements (contradictory to the *Mullen* testimony) that Randell gave at his deposition in 1976).*

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* Natelli flatly states that at the time of the *Natelli* trial the Government argued to the jury "a version of the facts which information within its possession established as untrue." (Br. at 49-50). By "information," Natelli indicates (Br. at 47-48) he means Randell's later testimony, especially at his deposition, which Natelli treats as the Gospel. And for his claim that this information was within the Government's possession 18 months earlier at the *Natelli* trial, Natelli gives as his basis the statement that, at Randell's deposition "Randell also testified that, prior to appellant's trial, he related *all* of these *facts* [in Randell's deposition] to the Assistant United States Attorney (Franklin Velie) who prosecuted appellant." (Br. at 21 n.14) (emphasis supplied). This is just another example of the mischaracterization of the record with which Natelli's brief is rife. At Randell's deposition, Natelli's counsel put some eight pages of leading, multifaceted questions. The last of these consisted of questions about Pandick Press as to which Randell's answers were entirely consistent with everything at the *Natelli* trial. Only then did Natelli's counsel put the following question to Randell:

> Q. Did you discuss with Mr. Velie the matters [which ones?] which you have just testified to [how far back is "just] in response to my questions [which ones?]? A. Yes." (App. to Br. at 13).

Thus, from Randell's mere affirmation that he had *"discussed"* with the prosecutor the *"matters"* referred to in Randell's immediately-preceding (*"just"*) testimony, Natelli would have this Court believe that Randell had "related" to Velie *"all"* of the *"facts"* contained in the great many pages of Natelli's counsel's questioning of Randell. As Judge Tyler remarked at trial in response to a similarly unsubstantiated accusation by Natelli's counsel that the Government was suppressing exculpatory material:

> "The Court: I am sorry. I have ample reason to doubt that. It has been seldom that I can think of a case in which more information has been available to the defense than there is in this one. You have had available, everybody has, the entire file of this situation. There is absolutely no doubt of that. The room shows it. The trial record so far as read intelligently by knowledgeable people shows that. I just don't understand why you could come in here and make an accusation of that kind. I don't think that sounds fair, reasonable or proper." (Tr. 1327).

Before Natelli would be entitled to such a hearing, he would have to meet the prior burden placed on him to show that the Randell statements were unknown to him in 1974 and could not have become known by due diligence; for otherwise he would have been in as good a position as the prosecutor to keep the trial free of error and to introduce evidence that would have shown the prosecutor's statements to have been, as he alleges, erroneous.*

It is fundamental that:

> "a defendant seeking a new trial *under any theory* must satisfy the district court that the material asserted to be newly discovered is in fact such and

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* For whatever conceivable relevance it may have, the Government offers (as it did to the District Court, who found it unnecessary) to have this Court examine Randell's Grand Jury minutes, *in camera*, so that the Court can satisfy itself that they contain no information at all similar to what Natelli now claims was exculpatory in Randell's later testimony, such as any reference to any pre-Pandick "commitment" from Eastern. (It is worth noting, in this regard, that at his guilty plea prior to the *Natelli* trial, Randell's chief lieutenant, Dennis Kelly, flatly stated that, as to both the Pontiac and Eastern "contracts," he knew "at the time that they were reflected in the shareholders' report[s] that they were not firm contracts." (Jt. App. at 14.)) But it is clear that, even if (contrary to fact) Randell had made such statements to the Government as Natelli supposes, the Government would have had no occasion to make them known to Natelli, for, as this Court has repeatedly stated:

> "The Government is not required to make a witness' statement known to a defendant who is on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish."

United States v. *DiGiovanni*, Dkt. No. 76-1097, slip op. 437, 442 (2d Cir., Nov. 9, 1976), *quoting United States* v. *Stewart*, 513 F.2d 957, 960 (2d Cir. 1975). Accord, *Williams* v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974); *United States* v. *Brawer*, 496 F.2d 703 (2d Cir.), *cert. denied*, 420 U.S. 1004 (1974); *United States* v. *Ruggiero* 472 F.2d 599, 609 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

> could not with due diligence have been discovered before or, at the latest, at the trial."

United States v. *Stofsky*, 527 F.2d 237, 244 (2d Cir. 1975) (emphasis supplied), *quoting United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). *Accord*, *United States* v. *Edwards*, 366 F.2d 853, 874 (2d Cir. 1966), *cert. denied*, 386 U.S. 919 (1967); *Brown* v. *United States*, 333 F.2d 723 (2d Cir. 1964). Natelli, in his papers to the District Court, did not even attempt to satisfy this burden. How could he, when his entire claim is that Randell's testimony was "crucial" precisely because it confirmed what Natelli had previously learned from Randell himself? Indeed, according to appellant's brief, Natelli himself, at his own trial,

> "testified that rather than having Eastern sprung on him at the printer's office, he had learned of it on a previous occasion, when *Randell* had mentioned that Eastern had made a substantial oral commitment during the nine-month period in question and that a formal commitment letter was expected shortly." (Br. at 37) (emphasis supplied).

It follows . . . this that at the time of his trial Natelli knew better than anyone else whom to call for confirmation of this account: to wit, the other party to the alleged conversation, Randell.*

Thus, even if the record is read as Natelli would have it read, it shows that Natelli was aware of an alleged prior verbal commitment from Eastern precisely because he said he had learned about it from Randell; consequently, he can hardly claim it was anything new when

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* Similiarly, Natelli knew from Randell's guilty plea that Randell if called, would have been obligated to admit that he gave a side-letter to Mullen giving Eastern the right to "cancel" the "commitment" and that he intentionally concealed this side letter from Natelli. (Jt. App. at 15-18).

Randell, in his deposition, repeated the same allegation. Yet this is all that is even arguably new and exculpatory in Randell's deposition, and his testimony in the *Mullen* trials does not even provide that much.*

In his instant brief to this Court, Natelli labors mightily, but unsuccussfully, to get around Judge Owen's findings that there was no "new evidence" and that, in any event, there was no exercise of due diligence to discover this evidence. Thus he states:

> "Judge Owen relied heavily upon the fact that appellant could have called Randell but declined to do so. . . . This fact would be relevant if appellant had moved for a new trial solely to present newly discovered evidence on a debatable issue already litigated at the trial. This, of course, was not appellant's position. [No?] Appellant seeks reversal of his conviction because statements made by the prosecutor have been contradicted by

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* Even if Randell's testimony means all that Natelli interprets it as meaning, its sole effect is to corroborate, inferentially, Natelli's claim that, instead of first learning of the Eastern contract in the morning hours of the meeting at Pandick Press, he first learned of it in a telephone conversation "right prior to that occasion." This slightly earlier mention of Eastern cannot in any reasonable way be said to undercut the Government's basic argument that the manner in which Eastern arose was, in the words of the Court of Appeals, "a matter for deep suspicion." 527 F.2d at 320. Accordingly, from any viewpoint and by any standard, the "newly-discovered evidence" contained in Randell's testimony is immaterial, as materiality is defined in terms of new trial motions. It is certainly not "so material that it would be likely to have produced a different result had it been available at trial," *United States* v. *Bermudez*, 526 F.2d 89, 100 (2d Cir. 1975), *accord*, *Brach* v. *United States*, Dkt. No. 76-2040, slip. op. 5487, 5495 (2d Cir., Sept. 9, 1976); nor would its availability have "created a reasonable doubt that did not otherwise exist," *United States* v. *Agurs*, 44 U.S.L.W. 5013, 5017 (U.S., June 24, 1976). Indeed, as noted, Natelli concedes that he "suspected" it was available but never thought it worth his while to find out for sure by calling Randell.

> statements made by another prosecutor and by government evidence in a subsequent criminal trial. The facts proving the inaccuracy of the prosecutor's statement have emerged only after appellant's trial, and the facts about which Randell has now testified are not fairly controverted by any other evidence." (Br. at 43 n.26).

This Court will by now recognize in this statement a good deal of wishful thinking. The truth is that no statements made by the prosecutor in *Natelli* were ever contradicted by statements of the prosecutor in *Mullen*, nor does Natelli's brief here ever so much as quote an example of such contradiction. Likewise, it is, as seen, inaccurate to refer to Randell's testimony in the *Mullen* case as "government evidence" beyond his admission of making the two payments to Mullen, but, in any case, nothing Randell said in the *Mullen* trials contradicts anything said by the prosecutor in *Natelli*. Also, the "facts" (as Natelli calls them) contained in Randell's volunteered statements at the *Mullen* trial and in his later deposition cannot be said to have "emerged only after appellant's trial" when Natelli himself claims to have testified at his own trial to having heard those very "facts" from the very man, Randell, in 1969. Finally, the claim that those "facts" are not fairly controverted by any other evidence is to ignore Kurek's testimony, Buck's testimony, Ball's testimony, Natelli's own contemporaneous admissions, and all the other evidence on the basis of which the jury at Natelli's own trial rejected the account he claims Randell would have corroborated.

Beyond all these objections to Natelli's statement quoted above, there is the more fundamental fact that nothing he says offers any reason for abandoning the legal proposition that he must first show that the essence of Randell's testimony was both unknown to him and

could not have been discovered by him with due diligence before he can go about trying to shift the burden to the Government in these situations. The reason for this rule is elementary. If the Government presented an "erroneous version of the facts" that could have been arguably controverted by the defense at the time, it would be unfair if the defense, instead, could just sit on its hands and, if a conviction resulted, get a new trial by claiming "new evidence". Indeed, it would be worse than unfair: it would be extremely deleterious to the efficiency of the judicial process and even to the adequacy of a defendant's defense, for it would place a premium on a defense counsel's doing nothing, rather than pursuing promising leads. It is just such considerations (together with still others, such as a reasonable expectation of finality and a distaste for the kind of post-verdict cross-examining of witnesses practiced here by Natelli) that has led this Court to hold repeatedly that "motions for new trials based on newly discovered evidence are not held in great favor." *United States* v. *Slutsky*, 514 F.2d 1222, 1225 (2d Cir. 1975); *United States* v. *Catalano*, 491 F.2d 268, 274 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974).

These principles apply with still greater force when the claim is not that the Government either presented perjured testimony or suppressed exculpatory evidence, but merely that, in summarizing the evidence at trial on its opening and summation, it presented an "erroneous version" because it did not take into account other "evidence" of which the defendant was on notice. What trial has ever occurred in which the parties in their respective statements to the jury did not paint differing pictures of the events, pictures which doubtless the other counsel always viewed as erroneous? If the verdict in a trial could be upset by showing that the portrayal given by the victorious counsel in his statements to the jury, even

though a fair summary of what was in evidence, did not take account of something outside the evidence, known or knowable to both parties, which the losing party believed was true but had chosen, nevertheless, not to put into evidence, then it surely follows that the verdict in virtually every case is in jeopardy.

Moreover, Natelli's bald attempt (Br. at 43 n.26) to suggest that his sole reason for not calling Randell as a witness at trial was Randell's refusal to be interviewed by him, is disingenuous to say the least. Actually, the record is clear that, having already placed in evidence through Natelli's own testimony the conversations about Eastern he would have sought to elicit from Randell, Natelli's experienced counsel sought to corroborate this version, not through calling Randell (whose lack of veracity he at that time professed to be rather acutely aware of), but by arguing that this version was corroborated by Randell's very absence. In particular, Natelli argued that not only the Eastern but even the Pontiac commitment must have been good; and that Randell, Kelly, Bushnell, Graham, and Mullen must have all been saying so to the Government, or else the Government would have called them.* Having chosen this strategic ap-

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* Thus, Natelli stated on summation:

> "Let's talk about the Eastern commitment, Pontiac commitment. You heard testimony from Day One that Mr. Natelli had insisted the Pontiac commitment wasn't what he wanted. You have also heard testimony from Mr. Natelli that was prior to the time he got to the printer that the Eastern Commitment was raised with him. You will remember that it was on August 7, a week before they went to the printer, that Mr. Kurek reported to Mr. Randell that Mr. Natelli was taking a tough position on this Pontiac thing and it was a problem. So within that week Mr. Randell had time to think about this Eastern commitment, to bring it to the attention of Mr. Natelli.

[Footnote continued on following page]

proach, Natelli is hardly in a position to complain now of his choice of tactics. As this Court said of virtually the identical defense tactic in *United States* v. *Tramunti*, 500 F.2d 1334 (2d Cir. 1974) at 1349-50:

> "[Defense Counsel] . . . was on notice of the basic facts which could have produced this alleged exculpatory testimony. Instead, he chose on summation to call attention to the failure of the Government to call upon other witnesses who could have corroborated [the Government's version of the events]. In view of this, we see no occasion to invoke *Brady*."

Finally, then, we find we have come full circle. Because there is no new evidence, Natelli's second point on this appeal can be seen to be but a thinly-disguised version of his first point: that the prosecutor, by choosing to withhold from the jury "exculpatory evidence" regarding Eastern, thereby failed to prove its falsity. But dressing up his argument in this further guise does not provide Natelli with any further reason for its relitigation or any better ground for its acceptance by this Court.

Let's remember one thing. The Government says to you that there was fraud involved in the booking of this Eastern Commitment. You heard his Honor say Mr. Randell pleaded guilty, Mr. Bushnell has pleaded guilty, Mr. Kelly has pleaded guilty. You heard Mr. Kurek testify after his plea of guilty he had 12 days to spend with the Government.

If there's something false or fraudulent about these commitments, those contracts, and these defendants knew it, where are Randell, Kelly, Bushnell?

How about Graham, the man whose signature appears on the Pontiac contract? How about Mullen? I'm not here to prove anything. The Government is here to prove beyond a reasonable doubt to your satisfaction that Mr. Natelli knew these contracts were false or fraudulent. Not one word of testimony from the people who were involved in these contracts." (Tr. 2200-01, Jt. App. 90-91) (emphasis supplied).

CONCLUSION

The denial of Natelli's new trial motion should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JED S. RAKOFF,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

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Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LAWRENCE B. PEDOWITZ, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 14th day of February, 1977 he served four copies ~~A copy~~ of the within Government's Brief by placing the same in a properly postpaid franked envelope addressed:

Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036
Attn: Philip A. Locovara

And deponent further says that he sealed the said envelope and placed the same in the mail box drop for mailing at the United States Courthouse, Annex, One St. Andrew's Plaza, ~~Foley Square~~, Borough of Manhattan, City of New York.

Lawrence B. Pedowitz
LAWRENCE B. PEDOWITZ

Sworn to before me this

14th day of February, 1977

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1977